MONTANA LEGISLATIVE HISTORY

Chapter 223 1999

Bill H 142 S _____ Original bill & history ___C

H. Committee on Natural Resources			S. Committee on Natural Resources		
Hearing Date(s)	1/25	___C	Hearing Date(s)	3/03	___C
	2/04	___C		3/11	___C
	_____	___C		_____	___C
	_____	___C		_____	___C
Date Out	_____	___C			

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

2/22	Transmitted to Governor		
2/24	Signed by Governor		
3/02	Chapter Number Assigned		
	Chapter Number 39		
	Effective Date: 2/24/1999 - All Sections		

HB 142 Introduced by Anderson *LC0082 Drafter: Everts*

Clarify the Treatment of a Transfer of Ownership Pursuant to the Montana Environmental Policy Act;...

By Request of Department of Natural Resources and Conservation

12/22	Introduced		
1/04	1st Reading		
1/04	Referred to Natural Resources		
1/25	Hearing		
2/04	Committee Executive Action--Bill Passed as Amended	12	8
2/04	Committee Report--Bill Passed as Amended		
2/06	2nd Reading Passed	61	35
2/09	3rd Reading Passed	64	34
	Transmitted to Senate		
2/10	Referred to Natural Resources		
3/03	Hearing		
3/11	Committee Executive Action--Bill Concurred	6	5
3/11	Committee Report--Bill Concurred		
3/15	2nd Reading Concurred	30	19
3/16	3rd Reading Concurred	29	21
	Returned to House		
3/17	Sent to Enrolling		
3/18	Returned from Enrolling		
3/19	Signed by Speaker		
3/19	Signed by President		
3/22	Transmitted to Governor		
4/01	Signed by Governor		
4/06	Chapter Number Assigned		
	Chapter Number 223		
	Effective Date: 4/01/1999 - All Sections		

HB 143 Introduced by Somerville *LC0667 Drafter: MacMaster*

Allow a Youth Court or Other Court with Jurisdiction over a Youth to Establish an Informal Peer Court to Which the Court May Refer a Youth for Informal Disposition;...

12/22	Introduced
1/04	1st Reading
1/04	Referred to Judiciary
1/13	Hearing
1/21	Tabled in Committee
3/01	Missed Deadline for General Bill Transmittal

HOUSE BILL NO. 142

INTRODUCED BY ANDERSON S

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE TREATMENT OF A TRANSFER OF OWNERSHIP PURSUANT TO THE MONTANA ENVIRONMENTAL POLICY ACT; LIMITING A COURT'S SCOPE OF REVIEW FOR AN ACTION OR CHALLENGE THAT AN ENVIRONMENTAL STATEMENT OR REVIEW IS NOT REQUIRED OR THAT THE STATEMENT OR REVIEW IS INADEQUATE; CREATING EXEMPTIONS FROM THE PROVISIONS OF THE MONTANA ENVIRONMENTAL POLICY ACT FOR ACTION TAKEN UNDER TITLE 77, MCA; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-1-201, MCA, is amended to read:

"**75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major

actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; ~~and~~

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made

available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) In any action challenging or seeking review of an agency's ~~determination~~ decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. In a challenge to the adequacy of a statement, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law."

NEW SECTION. **Section 2. Environmental review -- exemption.** (1) The department and board are required to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 only if the department is actively proposing to issue a sale, exchange, right-of-way, easement, placement of improvement, lease, license, permit, or other authorization for use of state lands or is acting in response to an application for an authorization.

(2) Except for rulemaking and as provided in subsection (1), the department and board are otherwise exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77, including but not limited to the issuance of lease renewals. The department and board do not have an obligation to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 if the department or board choose not to take any action, even though either may have the authority to take an action.

NEW SECTION. **Section 3. Codification instruction.** [Section 2] is intended to be codified as an

integral part of Title 77, chapter 1, part 1, and the provisions of Title 77, chapter 1, part 1, apply to [section 2].

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 5. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before an agency on [the effective date of this act].

- END -

HB 142 SPONSOR: Anderson, Shiell SHORT TITLE: Clarify environmental review for state proposals
BY REQUEST OF: Department Of Natural Resources And Conservation
REFERRED ON: 01/04/1999 HEARD ON: 01/25/1999
EXECUTIVE ACTION: 02/04/1999 Bill Passed as Amended -- VOTE: 12 - 8
FINAL DISPOSITION 04/06/1999 Chapter Number Assigned

HB 158 SPONSOR: Ohs, Karl SHORT TITLE: Revise storage tank inspection and closure law
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 01/04/1999 HEARD ON: 01/20/1999
EXECUTIVE ACTION: 03/29/1999 Bill Passed as Amended -- VOTE: 15 - 5
TABLED ON: 02/02/1999
FINAL DISPOSITION 04/29/1999 Chapter Number Assigned

HB 159 SPONSOR: Ohs, Karl SHORT TITLE: Submit underground storage tank inspector fee to vote
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 01/04/1999 HEARD ON: 01/20/1999
TABLED ON: 02/02/1999
FINAL DISPOSITION 03/31/1999 (H) Missed Deadline for Revenue Bill Transmittal

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HB 160 SPONSOR: Ohs, Karl SHORT TITLE: Submit fee for renewal of underground tank inspector license to electorate
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 01/04/1999 HEARD ON: 01/20/1999
TABLED ON: 02/02/1999
FINAL DISPOSITION 03/31/1999 (H) Missed Deadline for Revenue Bill Transmittal

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HB 161 SPONSOR: Ohs, Karl SHORT TITLE: Submit underground tank inspector exam guide fee to electorate
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 01/04/1999 HEARD ON: 01/20/1999
TABLED ON: 02/02/1999
FINAL DISPOSITION 03/31/1999 (H) Missed Deadline for Revenue Bill Transmittal

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MINUTES

MONTANA HOUSE OF REPRESENTATIVES
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN BILL TASH**, on January 25, 1999 at 3:10 P.M., in Room 437 Capitol.

ROLL CALL

Members Present:

Rep. Bill Tash, Chairman (R)
Rep. Hal Harper, Vice Chairman (D)
Rep. Cindy Younkin, Vice Chairman (R)
Rep. Rod Bitney (R)
Rep. Aubyn A. Curtiss (R)
Rep. Rick Dale (R)
Rep. Bill Eggers (D)
Rep. Ron Erickson (D)
Rep. David Ewer (D)
Rep. Gail Gutsche (D)
Rep. Joan Hurdle (D)
Rep. Dan McGee (R)
Rep. Douglas Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney (D)
Rep. Bob Story (R)
Rep. Jay Stovall (R)
Rep. Carley Tuss (D)
Rep. Doug Wagner (R)

Members Excused: None.

Members Absent: None.

Staff Present: Deb Thompson, Committee Secretary
Kathleen Williams, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: House Bill 142, 1/20/1999;
House Bill 298, 1/20/1999
House Bill 300, 1/20/98

Executive Action: None

HEARING ON HOUSE BILL 142

Sponsor: Rep. Sheill Anderson, HD 25, presented the bill. He explained the bill addressed grazing leases and their renewal. He referred to an amendment. **EXHIBIT(1)**

Proponents: Bud Clinch, Director DNRC, spoke in support of the bill. He said this bill deals with the School Trust Land management. The bill clarifies the law regarding special uses. Plaintiffs allege an EIS is inadequate. The problem is there is a never ending time period for new findings and allegations. He pointed out the department was a victim of procedure, surprised by new evidence. The courts have allowed late evidence of material facts. These issues are intended to be a board decision, however every administrative decision can be challenged in an issue raised after the fact. Every such challenge will intrude into agency decisions, making and substituting their judgement for that of the agency. ***{Tape : 1; Side : A; Approx. Time Counter : 4.4 - 18.4}***

John Blomquist, Montana Stockgrowers Association, spoke in favor of the bill. He pointed out that MEPA was nebulous, where many terms of the act were undefined. Interpretations were easily litigated. He said it was a good idea for the Legislature to add guidance. He discussed an amendment. He talked about what would trigger a MEPA review, such as season of use, changes in crop, lease renewals and the hundreds of leases the department deals with. He suggested lease renewals not be subject to MEPA review providing there is no material change. He pointed out direction was needed since the MEPA statute was nebulous. ***{Tape : 1; Side : A; Approx. Time Counter : 18.6 - 28.3}***

Cary Hegreberg, Montana Wood Products Association, pointed out the issue was "analysis paralysis". MEPA was originally conceived as a "look before you leap" statute. It was designed to direct decision makers at the state government level to analyze and consider environmental impacts of actions which they were about to embark upon. Unfortunately, MEPA, which was a well intentioned statute, has been abuse, over interpreted by the courts and is one of the primary factors strangling the economy in Montana. He read a letter from an employee from the Department of State Lands. That letter described concerns from that employee regarding five years of litigation with the Friends of the Wild Swan. He pointed out the loss of jobs by loggers and families. The original intent of the Montana environmental policy, MEPA, is now used by litigious groups. MEPA is hard to define and expensive in court. Revenue from forested trust lands are declining. He distributed a letter from Patrick Heffernan, Staff Forester representing the Montana Logging Association.

EXHIBIT(2) Heffernan pointed out MEPA was designed as a decision-making tool so that state agencies could make better decisions regarding management projects and their effects on the environment. He pointed out State Trust Lands are not public lands per-se, but lands designated to provide for the generation of revenue for their respective beneficiaries. MEPA has become the basis for many frivolous lawsuits designed to hinder lawful and sound state management actions.

Gail Abercrombie, representing the Montana Petroleum Association, spoke in support of the bill. She pointed out the bill would give clear direction so insignificant changes could be made to a lease without triggering a MEPA review.

Don Allen, Western Environmental Trade Association, spoke for the bill on behalf of the association members. He said the bill would be an improvement regarding the interpretation of MEPA. ***{Tape : 1; Side : A; Approx. Time Counter : 34.3}***

Jim Mockler, Montana Coal Council, spoke about how MEPA was used to stop projects. The bill would make material facts available up front.

Jill Andrews, Montana Mining Association, said the bill would allow for clarification. It is an important step to prevent delays in projects.

Bill Snoddy, representing Government Affairs in the McDonald Gold Project, discussed his views. He noted they were painfully aware of the inadequacies of MEPA.

Opponents: Ira Holt, Ravalli County Fish and Wildlife Association, said their association was one of the oldest clubs in the state. They had opposed the timber sale because of the wildlife concerns. They feel the bill is a retaliation for the suit they won. He discussed the effects of domesticated sheep on wild sheep. He described how no action was done at the Department of State Lands to address their concerns. There was no process for appeal and no review. The case went to the Supreme Court where they won. Now there are guidelines to protect the wild sheep. He pointed out appropriate actions are needed when conditions on the ground warrant it.

Tony Schoonen of Butte, representing the State Lands Coalition and Public Lands Access Association, spoke against the bill. They felt the bill would allow state agencies to create a closed government and avoid responsibilities. They believed the environmental policy act would allow an EA review prior to submitting lease bids, so problems such as diseased bison could be addressed. They pointed out the short time frame for bidding

on leases and the excessive time of 20 years. **EXHIBIT(3), EXHIBIT(4), EXHIBIT(5), EXHIBIT(6)** ***{Tape : 1; Side : A; Approx. Time Counter : 43.8}***

Tamara Trogekiss, Cottonwood Resource Council, spoke as an opponent to the bill. She discussed the importance of planning growth relative to the Stillwater Platinum Palladium Mine. She explained she was the McCloud Ranch Manager. She worked at making sure the mine goes correctly. It seemed to her that the agencies were looking to shut out the public. She objected to allowing the agencies decide what was adequate evidence. She suggested requesting an EIS was a way to address inadequacies. MEPA provides citizens with a means to "watchdog" what regulatory agencies and industry are doing. Citizens must have the ability to introduce new concerns and new evidence in court. ***{Tape : 1; Side : A; Approx. Time Counter : 46.5-51.9}***

Van Jamison, representing the Montana Wildlife Federation, opposed the bill. He said the bill was intended to clarify the Montana Environmental Policy Act. However, he objected to two of the provisions. The bill would allow a limitation to the scope of a review, which represented a fundamental shift in the responsibilities from the agency to the citizen. This provision would force average citizens to gather evidence regarding any environmental issues they raise and to present their evidence to the agency before the agency makes its decision. Currently, agencies properly are charged under MEPA with a fundamental belief, to make an independent assessment of the environmental consequences associated with the decisions that they make. They have been given this duty because they have professional staff who can conduct investigations, and ability to collect fees to require additional expertise to evaluate the issues. Citizens have meaningful input that should not be disregarded. He pointed out the department and the board exempt themselves from compliance with MEPA even when there are environmental consequences. Agencies have responsibility to protect the public. There should be a proper balance between a citizen's obligation to participate in the process and the agencies duty to investigate the information to properly evaluate their concerns.

Harley Harris, Assistant Attorney General, appearing on behalf of Attorney General Joe Mazurek, raised some concerns about the bill. **EXHIBIT(7)** He read a memorandum which discussed evidence being presented prior to an agency decision and the exemption for DNRC from MEPA for functions such as lease renewals and assignments.

{Tape : 1; Side : B}

Rusty Harper, representing the State Auditor's Office and Mark O'Keefe, said he supported the Attorney General's Office. He pointed out the disagreement that the Land Board had with the Board of Regents over this same issue. The Board of Regents should be under the same rules.

Janet Ellis, representing the Montana Audubon spoke against the bill. **EXHIBIT(8)** She pointed out the MEPA law allowed citizens to examine major actions of state government and the affects on the environment.

Anne Hedges, Montana Environmental Information Center, spoke against the bill. She pointed out the need to use MEPA based on inadequate EIS. The public should be able to participate in the process.

Tary Mocabee, representing Friends of the Wild Swan, spoke against the bill. **EXHIBIT(9)** She pointed out that truth was being revealed on projects all the time, but the bill would require that all the facts be present in the beginning. She presented excerpts of an analysis by Jack Tuholske. **EXHIBIT(10)**

Joe Kirwin, Deputy Secretary of State, spoke as an opponent. ***{Tape : 1; Side : B; Approx. Time Counter : 5.2}***

Art Noonan, representing the Sierra Club from Butte, opposed the bill.

Bill Holdorf, Butte Skylines Sportsman Club, opposed the bill.

Joe Lambs, representing Office of Public Instruction, opposed the bill.

Betty Waddell, Montana Association of Churches, spoke against the bill.

L.F. Thomas, representing the Anaconda Sportsman Club, was against the bill.

Jerry Wells, Montana Council of Trout Unlimited, was opposed to the bill.

Art Callan, Bitterroot Chapter of Mule Deer Foundation, opposed the bill. He distributed an article about diseased bison. **EXHIBIT(11)**

Dale Cartwright, Anaconda Sportsmen Club, opposed the bill.

Ron Cunningham, representing the Montana River Action Network and Fishing Outfitters Association, spoke against the bill.

Questions from Committee Members and Responses: Rep. Raney asked Rep. Anderson about material changes regarding exemption from MEPA review and potential impacts. Rep. Anderson replied this addressed change in use. He said what is critical is that there is a lease in place that has parameters. This lease would still be wide open to where an EA or an EIS could be overridden all of the time during that lease, regardless of who owned it. The proper time for an EA or an EIS is at the start of that lease. After the contract is in place, it is prone to be re-opened and re-negotiated.

Rep. Raney said the opponents identified the issue of how could citizens know all the potential uses of state land, when the original lease was granted, so they could answer all of their concerns in the beginning when in the beginning they are only addressing the proposed use. How could they know that there would be a change in use that would affect them when there is no proposal for that use in the original application.

Rep. Anderson replied if you have a lease that is in place, if you want to do something that lease doesn't address that would be a change of use. That would trigger an opportunity for an EA or an EIS. Rep. Raney pointed out in the Sheep vs. Sheep case the change in use did create a significant impact that under the bill would not be addressed. Rep. Anderson replied that was a unique situation. The court in trying to address that situation has left the door wide open in allowing all of these leases to be held up.

Rep. Dale asked if the original lease triggered a review. Clinch replied that they may not have known unless the plaintiff brought it to them. Section two addresses the discretion of the department when a plaintiff brings in that issue the department has the discretion to analyze those facts and determine if it warrants that. He pointed out the department gets all sorts of requests that they believe to be arbitrary. He noted that section two was not exempting the department from MEPA but rather clarifying that for those activities where they have the authority to act but are not bound to, there will be some discretion. It is important to remember the part in section one where it lists all those other things, such as the issuance of new leases, sale and exchanges, that the department is bound to do MEPA on those because it is an initiation of a new project. He wanted to clarify that when there is really something happening on the landscape that the department has the authority to act. ***{Tape : 1; Side : B; Approx. Time Counter : 9.8 - 13}***

Rep. Dale asked what other issues would be imposed on the department staff if they were bound to do an EA or an EIS. Clinch described Eastern Montana issues and the potential significant effects of multiple cases, relative to future concerns on the landscape. There were a number of issues on the horizon in some people's minds that there was potential significant effects. If those issues were raised, the department would be bound to that so the entire staff would be focused on analyzing those aspects and defending those in a court of law. Staff that are bound to do other things would be allocated to do MEPA compliance.

Rep. Ohs asked how many actions the department dealt with per year that could have potential issues. Clinch replied the department routinely transferred or renewed about 2,000 per year. These were all types of issues from oil and gas leases, grazing leases to agricultural leases. ***{Tape : 1; Side : B; Approx. Time Counter : 16.5}***

Rep. Hurdle asked what kinds of things would the department and the board be exempt from. Clinch replied section one references all the things that would be clarified that the department would not be exempt from. An example would be an existing lease on the landscape, an agricultural tract to grow a crop. A lease would be typically in place for a ten year duration. When that lease was issued it came with a whole set of stipulations that allowed for various kinds of crops and identified reports or payments due, including environmental concerns. He pointed out in practicality those agricultural leases are changed and they are allowed to change by the provisions of that contract. He described changes that were allowed such as changing to another crop because of market conditions. This is the crux of the concern. His lease has already been authorized. If a plaintiff raises questions whether a project may have significant effect, an EIS must be done. Changes that occur within the lease that were allowed, now under this interpretation, when a lessee exercises the discretion of his lease and someone alleges an impact, the department is supposed to do an EIS. ***{Tape : 1; Side : B; Approx. Time Counter : 17.5 - 21.4}***

Rep. Hurdle asked what this bill had to do with changes of crops. Clinch replied Title 75, Chapters 1 and 2 are MEPA. It talks about implementing provisions of Title 77. Title 77 are the titles that reference the management of school trust lands. These issues in the new section two don't pertain to any other agency. They are specific to the Department of Natural Resources and even more specific to the management of School Trust Lands.

Rep. Hurdle said she was concerned about using the department's discretion to prohibit citizens to introduce new information. Clinch replied it was important to understand that section addressed the challenge to the department's decision making in MEPA. The department is not proposing to be exempt from MEPA. As far as limiting information, if there never is a final time when the record is closed, it is impossible to ever come to a decision and present it to a judge for review if they always continue to accept new information that occurred after the process.

Rep. Story asked about the purpose of the retro-activity clause. Tommy Butler, Legal Counsel for the Trust Land, replied this retro clause applied to the ES and EIS that were currently being worked on. Rep. Story asked Clinch about the purpose of the Land Board in relation to the trust lands. Clinch replied the Land Board was created in the Constitution and they were granted specific authority to overview the management of the School Trust Lands and the production of revenue with specific requirements spelled out in statute.

Rep. Erickson asked if it was the department's contention that there could never be a new issue. Rep. Anderson replied the new issue was one presented at the district court level. Rep. Erickson pointed out that citizens should not be responsible for the gathering of data. He asked what the distinction was between issues and new evidence. Tommy Butler replied his experience spanned 15 years of litigating MEPA. He described what would happen in district court. An environmental litigant will ask to expand the administrative record. He will ask the judge to consider new evidence which the administrative agency has never seen and never been given a chance to respond to. He said "the game comes down to this - can an environmental litigant ask a question that has never been considered by the agency? Where the agency has never seen the evidence or issue that is a pretty easy game to play." He noted Rep. Erickson's question specifically was is the distinction between issue and evidence. Precisely what will happen in a MEPA case, an environmental litigant will say that the document is inadequate because it failed to consider a number of important environmental questions. They will present their evidence, usually in the form of expert testimony usually from a technical witness like a biologist. By the time these cases get to court, there have been extensive public comment period, scoping periods, draft documents, public participation, oral and written comment in response. There is fundamental agreement on the issues at that point. Issues are usually not the fundamental source of disagreement in a MEPA lawsuit. Instead, it is the question of evidence. The question before the committee today is how to level the playing field, how to respect the agencies authority to do this fact finding - to take

incredibly complex issues and grind them down and come to a common sense solution. Should this be left to district courts? The agency bill here says no. The Montana Supreme Court has had less and less respect for agency decision making. What they are doing is remanding these cases back to district court and letting the judges be the arbiters between two opposing experts. This bill would send that new evidence back to the agency for consideration. The district court would then look at the administrative record. Currently, there is civil litigation and the judges choose who is right. He suggested the agency staff had the training and expertise for these types of issues. These staff include hydrologists, geologists, wildlife biologists and others.

Rep. Erickson asked Mr. Jamison to discuss the amendment. Jamison replied this amendment would allow citizens to identify what they think the agency has not considered. This would allow the agency to factor information into their decision making process. He pointed out an issue could be raised at a public meeting that the staff did not get. The person who made the comment at the public meeting is denigrated, such as-they weren't very intelligent, they didn't know what they were talking about. This person had to overcome the fear of public speaking. He suggested going back to find out that person's issue. Most agencies act arrogantly and believe citizens can't participate effectively unless they have credentials. The person does not know they have been disenfranchised until afterwards. Then they have to hire somebody with the expertise to go head to head. That is the extra administrative record information that the courts allow in. The agencies are supposed to listen to the citizens, sort through the issues and then fairly investigate it.

Rep. Raney asked about leases that existed that had never had environmental review. Clinch replied some leases date back to 1889. Rep. Raney asked about these leases that rolled over to a new use. Clinch replied the statute addressed the renewal of the leases, 77-6-205, where the leases were renewed automatically. They do not come under the current MEPA because they are not discretionary actions of the department but administrative.

Rep. Raney asked about present activities covered by MEPA that would not be covered because of this bill. Clinch pointed out page 3, line 20-24, which listed normal activities done by the department as a state action. The only activity that may be exempted from MEPA was when a lessee proposed to do something that is already authorized to him, that somebody else would allege may affect the environment. The department would have the discretion to do an environmental review but would not be bound to on every one of those that is alleged to have an impact on the environment.

EXHIBIT 1
DATE 1/25/99
HB 142

PROPOSED AMENDMENT TO HOUSE BILL 142

INTRODUCED BY ANDERSON, S.

HOUSE BILL 142, as introduced, is proposed to be amended as follows:

On page 3, line 14 following the words "consideration prior to the agency's decision." add the following new language:

"Where new, material, and significant evidence is presented to the District Court, which had not previously been presented to the agency for its consideration, the District Court shall remand the new evidence back to the agency for its consideration and an opportunity to modify its factual findings and administrative decision before the District Court considers such evidence within the administrative record under review. Immaterial or insignificant evidence shall not be remanded to the agency or considered by the District Court. The District Court shall not hold any evidentiary hearings or make any original findings of fact, but shall only review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review".

2

EXHIBIT 2
DATE 1/25/99
HB 142

MONTANA LOGGING ASSOCIATION

HB 142

Testimony of Patrick Heffernan, Staff Forester
Before the
House Natural Resources Committee
January 25, 1999

Mr. Chairman; members of the committee:

I regret that I am unable to attend the Committee hearing on this Bill and present these comments in person.

These comments regarding HB 142 are submitted on behalf of the Montana Logging Association, a trade association representing independent logging contractors in the State of Montana.

The Montana Logging Association (MLA) supports HB 142. MEPA was designed as a decision-making tool so that State Agencies could make better decisions regarding management projects and their effects on the natural and human environment. Unfortunately, MEPA has since become the basis for many frivolous appeals and lawsuits that seek to enjoin lawful and sound state management actions. In many cases, these litigated lawful actions are State Trust Land timber sales designed to produce sustained revenues for dedicated beneficiaries of State Trust Lands, while providing for public values.

It should be implicitly understood that State Trust Lands are not public lands per-se, they are lands designated to provide for the generation of revenue for their respective beneficiaries. While we understand and support the need for public input and involvement during the development of State Trust Land management actions, we are dismayed at the depth and breadth that current legal interpretations of MEPA statutes allow litigants to pursue. To allow the litigation of infinite, perceived, associated and cumulative project effects to continue is to invite the complete analysis-paralysis of State Trust Land management.

We respectfully request that you adopt HB 142, which will help to re-focus the original intent of NEPA, which is to make good management decisions.

Respectfully submitted,

Patrick Heffernan

P.O. Box 1716 • Kalispell, MT 59903 • (406) 752-3168 • Fax (406) 756-9574 • Email: mla@digisys.net

EXHIBIT 3
DATE 1/25/99
HB 142

3

THE MONTANA COALITION FOR APPROPRIATE MANAGEMENT OF STATE LAND
3210 OTTAWA
BUTTE MONTANA 59701

Chairman Tash--Members of the committee:

For the record, my name is Tony Schoonen of Butte and I'm here representing the State Lands Coalition and Public Lands Access Asso.

Our organizations are totally opposed to H.B. 142. We feel that this bill is a "Get Even" bill which allows state agencies to "duck their responsibilities" and create a form of "closed government". The tax payers of this state deserve more.

How dare we even question the actions of personnel within the state lands division of DNRC even tho the vast majority of their salaries and benefits come from taxes paid into the General Fund by average working families and retirees like myself. This figure may be 50% now.

When our groups found that these same people knowingly broke the law by recommending that the state land board okay the Turner land exchange, we had no other option but to go to court. Our sportsmens groups participated from day one by attending hearings with the state land board and commenting on the E.I.S. We even paid for an attorney to interpret the law for them prior to filing the law suit.

We easily won our case in the Supreme court as did the sportsmen in the Ravalli law suit. Under this bill we would'nt be able to question or take part in any action that would go against the people that are playing "WAR Games" with our state trust lands. The letter submitted by Allen Schelenberger of Sheridan in Madison county emphasises all the same concerns that we expressed very early on in the Turner land exchange. We request that his letter be included in our testimony.

Now the leases are being let on the Snowcrest land that we received in the exchange. We want to see the local Robb Cr. grazing association stay in business, but this will be very difficult if the price per AUM is bid upwards to $25 per cow-calf. This is way above community standards.

Our groups felt that the Mont. enviornmental policy act would allow an E.A. review prior to submitting the lease bids. This bill ensures that we have no rights to question the diseases such Para T.B. which is spread by buffaloe, or the six foot electric fence near our game range, Robb Cr. along with many other concerns. Again, we have been involved from day one.

This bill promotes taxation without representation or participation.

Please vote NO on this regressive legislation.

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EXHIBIT 4
DATE 1/25/99
HB 142

THE MONTANA COALITION FOR APPROPRIATE MANAGEMENT OF STATE LAND

3210 OTTAWA
BUTTE MONTANA 59701

January 18, 1999

To: Montana State Land Board
Director, MDNRC
Director, MDFWP
Sportsmen's Organizations
PLAAI
Livestock (Cattle) Producers
Newspapers
RMEF

URGENT

Citizens, sportsmen, livestock (cattle) producers and professional biologists should express opposition to plans of the Montana Department of Natural Resources and Conservation to issue 20-year state leases on five units within the Snowcrest properties, Madison County.

There are a multitude of serious and potentially serious problems associated with the proposal involving 12,179 acres. A short time frame for bidding, by January 28, 1999, shows the urgency to ask questions of the Montana State Land Board.

These new state leases are adjacent to and within the Robb Creek Wildlife Management Area (WMA). Sportsmen's dollars, nearly 1.5 million, were used to purchase 17,000 acres from loan money of the Rocky Mountain Elk Foundation (RMEF) and Anheuser-Bush, all to be paid back, plus interest. HB526 funds totaling nearly two million dollars.

In addition, FWP leases 10,000 of state land and 7,000 acres of BLM are within the WMA (34,000 total). Thousands of acres of National Forest are adjacent to the WMA.

FWP followed the environmental process (Montana Environmental Policy Act) to acquire the 17,000 acres, in addition to a separate EA to recommend rest-rotation grazing only by cattle only on FWP properties utilizing the principles and concepts of August L. Hormay (1970). Public meetings were held in 1992 - 1993, and adequate time was allowed for additional public comment. Both EAs were approved following the process.

Now, plans of MDNRC to issue these 20-year leases by bidding on January 28, 1999, avoids the environmental review process. The public will be left out of the process, and it appears FWP has already been excluded from the process.

over 1/25

The obvious result of approval of these 20-year leases will be bison grazing and outfitting adjacent to and within the WMA. This is especially true for Unit 5, in the heart of elk range.

How will our wildlife resource be protected, and the sportsmen's two million dollar investment in habitat?

The change in class of animals from cattle to bison, an unclassified animal in the Montana Statutes (MCA), and the insistence of MDNRC to promote outfitting for 25-50 cents/acre, along with other potential problems, such as disease potential from bison to big game species, cattle and bison style fence (6-wire, high tensile, 66" ht), could be a devastating blow to the valuable resources in the area. What about public access to and on public lands?

Recommendation

The entire bidding process should be delayed pending a more comprehensive review of impacts. FWP biologists, sportsmen, citizens, cattle producers, disease experts, and other range and wildlife professionals must participate in the process. An environmental assessment and/or EIS (MEPA) should be developed.

Contact the State Land Board and Director, MDNRC, now to express your concerns. Once the leases are issued, there is no turning back.

Contact:

State Land Board, Capitol Building, Helena, 59620
Director, MDNRC, P. O. Box 201601, Helena, 59620, telephone 444-2074.

Board of Directors and Members

EXHIBIT 5
DATE 1/25/99
HB 142

5

Allen Schallenberger
53 Elser Lane
Sheridan, MT 59749-9604
Jan. 22, 1999

Representative Bill Tash
Chairman House Natural Resources
Capitol Station
Helena, MT 59620

Dear Chairman Tash:

I am writing in opposition to HB 142 and ask that my letter be included in the committee record.

Freedom is something that we are losing due to action by various government agencies and lack of control on their actions. This bill removes more of our freedom to protect ourselves from bad actions by the Department of Natural Resources. I believe that HB 142 may be a direct result of the ongoing controversy over land exchanges with Turner Enterprises and leases, which are not in the best interests of the citizens of Montana. I believe that government bureaucrats should be looking out for Montana citizens and resources first and then interests of non-residents later.

There are many controversial aspects of raising bison on state lands and not the least is the reported presence of paratuberculosis (Johne's disease) in Turner's bison. Para means like tuberculosis and both diseases are caused by the same genus of Mycobacterium which is highly infectious. Paratuberculosis causes a wasting of the gut and the animal eventually starves to death. This disease causes an estimated 1.5 billion dollars damage to cattle in the US each year and also can be spread to many other animals including most of our ungulate wildlife species. There is no known cure for the disease. It is very hard to detect and there is considerable evidence that it causes Crohn's disease in humans. This terrible disease, inflicting 500,000 Americans, causes effects in humans similar to animals if not treated properly. In Turner's rush to become Mr. Big in Bison, he apparently purchased small game farm bison herds from all over the United States and then allegedly brought their associated diseases and parasites to Montana.

The DNRC has no regulations for grazing of bison, an unclassified animal in Montana, which generally fall through the cracks when raised in a domestic status. Fences for bison can be very detrimental to wildlife species attempting to use their accustomed range. Bison grazed yearlong on land may also compete with wildlife for browse, forbs and grass species which cattle often don't eat.

over

Bison have to be considered a dangerous animal as compared to most cattle and could harm unwary persons using state or other public lands.

Cattle ranchers have difficulty competing with bison bidders on state land since bred cow bison often sell for as much as $5,000.00 and "hunts" for bull bison may bring $8,000.00 or more. Yet on our public lands bison fees are the same as for cattle.

For the past two years we have been working on updating our Madison County Comprehensive Plan. Our County Commissioners will vote on the final draft on Jan.25th probably as you are meeting in Helena. That plan stresses that agricultural lands should be protected, that important wildlife habitat should be protected and that subdivisions be encouraged near the major population centers. Studies have shown that remote subdivisions adversely impact other citizens and ranchers in our county. Unfortunately I learned just this week that the Division of State Lands recently met with the county to propose 50 cabin sites on state land recently acquired from Turner. The location of those sites would violate many of the principles stressed in the revised county plan.

Keep some citizen control over the Dept. of Natural Resources and kill this bill.

Sincerely,

Allen Schallenberger

Allen Schallenberger
c. Representative Karl Ohs and Senator Chuck Swysgood

ps. I am a Montana Native, former experienced wildlife biologist and cattle rancher, and am presently an outfitter and wood worker. Enclosed find copies of my letter for all committee members.

EXHIBIT 6
DATE 1/25/99 6
HB 142

Friday, January 22, 1999

Ranch lease a done deal?

Opponents say state's plan custom-made for Ted Turner

BY PERRY BACKUS
of The Montana Standard

ALDER — The state's decision to issue 20-year leases on the former Snowcrest ranch property recently acquired from media magnate Ted Turner has raised the ire of some sportsmen's groups.

Members of the Montana Coalition for Appropriate Management of State Land say the unusually long leases, high minimum bid requirements and a short time frame are the Montana Department of Natural Resource and Conservation's way of ensuring Turner will be given the leases.

And they worry about the ramifications of Turner's buffalo ending up on land that is important wildlife habitat.

"This deal is just greased for Turner," said Tony Schoonen of Butte, a coalition member. "The whole thing is just phony ... we've tried to work with them and have gotten nowhere."

But state officials say that this is business as usual.

Scott Frickel, a DNRC specialist with the School Trust Management Division, said the bids will be sealed and anyone interested in obtaining the leases will have the same opportunity as the

See DEAL, Back Page

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Deal ...

Continued from Page A1

next person.

"Everyone will be an equal player," Frickel said. "No one will be given preference. No one will be able to match any bid. We thought that was the fairest way."

Frickel said the state can't discriminate against Turner.

"We're trying to do things right, legal and give everyone a fair shake," he said. "If he (Turner) has the deepest pockets and wants to ante up, then it's tough to stop him."

At stake are a little over 12,000 acres that once belonged the Turner's Snowcrest Ranch in southwestern Montana. The state acquired the land after trading about 7,500 acres it owned inside Turner's Flying D ranch near Gallatin Gateway. The state also received acreage at Ulm Piskun near Great Falls.

A court challenge on the trade by the Montana Coalition for Appropriate Management of State Land was settled last fall, which opened the door for the state to issue the new leases. Turner held a temporary grazing lease on the property through the last grazing season.

Frickel said the DNRC decided to put together a "special lease" package that will give the lessee the right to restrict cabin site development and timber harvest as well as control outfitting on the property.

Under the provisions of a "special lease," Frickel said the state can offer the potential bidders more than the normal 10-year lease on state school trust land agriculture leases.

The DNRC chose to offer the 20-year lease with the hopes it would bring in more money to the trust, said Frickel.

"We try to generate as much income as possible for the trust," he said. "We felt the bids would come in higher if locked in for 20 years."

"This deal is just greased for Turner. The whole thing is just phony ... we've tried to work with them and have gotten nowhere."

Tony Schoonen, Butte, Montana Coalition for Appropriate Management

The parcel drawing the most attention is nearly surrounded by the Montana Department of Fish, Wildlife and Parks' Robb-Ledford Wildlife Management Area. The 3,600-acre parcel is what used to be called the McGuire Property and both sportsmen and Fish, Wildlife and Parks people are worried about what might happen if it falls into the wrong hands.

Joel Peterson, Fish, Wildlife and Park's regional wildlife manager, said the department is interested in incorporating that property into the game range. Peterson said FWP is developing a new grazing plan for the wildlife management area. He said if the department obtained the lease on the property, the same grazing association (made up of local ranch families) would be able to graze their cattle on the property.

"We're willing to pay the same as anyone else for the lease," Peterson said. "And local lessees would benefit. There would be no loss of revenue to the trust and it would benefit the people of Montana."

Peterson said FWP has been informed it would have to bid just like everyone else on the property.

"That did kind of surprise me," he said. "I thought we might be able to match the high bid on that parcel."

The 34,800-acre game range already includes about 10,000 acres of land leased from DNRC, Peterson said. Most of that land is adjacent to the McGuire Property, he said.

Neil Barnosky, a member of the Robb-Ledford Grazing Association, said that despite the high minimum bids required by the DNRC, the grazing association is considering making a bid. The association is comprised of five local ranch families.

The DNRC's minimum bid figures to be about $11.80 an animal unit month (AUM), Barnosky said. Other state land leases are going for about $9.60 an AUM and private leases (which require no work after dropping off the cattle) can run as high as $16 to $18 an AUM, he said. The AUM is a pasture measurement — what one cow and calf eat in a month.

In today's depressed cow market, Barnosky said $11.80 "is getting pretty pricey."

Schoonen said sportsmen worry about the possibility of Turner's buffalo ending up on the McGuire Property because of the type of fence required to keep the animals from straying. That fence can be nearly six feet high, and contains six strands of high-tensile wire, which is often electrified, he said.

That type of fence can impede the movement of wildlife and could keep elk off critical winter range, said Schoonen.

Tony Jewett, executive director of the Montana Wildlife Federation, said that organization supported the state's trade with Turner because of the potential for better wildlife habitat and public access.

"Any compromise from that direction is a broken promise to the sportsmen of this state," he said.

The Standard's telephone calls to Turner Enterprises were not returned.

EXHIBIT 7
DATE 1/25/99
HB 142

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MEMORANDUM

To: JOE MAZUREK

From: HARLEY HARRIS

Re: HB 142

Date: January 23, 1999

This is in response to your request for an analysis of HB 142, which is a DNRC-requested bill to amend MEPA and add a provision to Title 77, chapter 1, part 1 exempting it from MEPA compliance for ministerial activities. A copy of the bill is attached. In this memo I will focus primarily on the legal aspects of HB 142. I have attached a copy of testimony prepared by Van Jamison on behalf of the Montana Wildlife Federation in opposition to HB 142 in order to provide you with an idea of the policy debate it has precipitated.

HB 142 deals with two essentially separate subjects. The first is in the proposed revision to MEPA (Mont. Code Ann. § 75-1-203(1)), which seeks to impose what appears to be an absolute administrative exhaustion requirement on all MEPA-based judicial challenges. This revision would be applicable to all state government agencies. The second is in the addition of a new section to MEPA (Mont. Code Ann. § 75-1-203(1)), and a new section to Title 77, chapter 1, part 1 to exempt TLMD from MEPA compliance for all but a specific list of activities.

1. **Exhaustion requirement.** HB 142 proposes to add the following sentence to Mont. Code Ann. § 75-1-201(3)): "In a challenge to the adequacy of [a MEPA document] , the court may not consider any issue ***or evidence*** that was not first presented to the agency for the agency's consideration prior to the agency's decision." (Emphasis added). DNRC explains this provision is necessary to prevent citizens from "sandbagging" state agencies by not raising issues and evidence at the administrative level and then using that information in a subsequent judicial challenge to the adequacy of the EIS. DNRC further contends this provision simply conforms Montana law with federal NEPA law.

NEPA and MEPA caselaw both generally require that challenges to agency decisions be based on the administrative record. See generally Mandelker, NEPA Law and Litigation § 4.09[1][b] at 4-66 ("Supreme Court decisions hold, subject to limited exceptions, that district courts should base judicial review on an agency's administrative record and not take new evidence to supplement that record"); see also Mont. Wilderness Ass'n v. Bd. of Nat. Res., 648 P.2d 734 (Mont. 1982). The most critical exception to the general exclusion of extra-record evidence, however, occurs where a plaintiff claims that an agency either improperly failed to issue an EIS or, more relevant here, that the one it did issue was inadequate. In such a case

> allegations that an [impact statement] has neglected to mention a serious environmental consequence, failed to adequately discuss some reasonable

> alternative, or otherwise swept "stubborn problems or serious criticisms . . . under the rug" . . . raises issues sufficiently important to permit the introduction of new evidence by the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.

County of Suffolk v. Sec'y of Interior, 562 F. 2d 1368, 1384-85 (2d Cir. 1977) cert. denied, 434 U.S. 1064 (1978) (citations omitted); accord Nat'l Audubon Society v. U.S. Forest Serv., 46 F. 3d 1437, 1447 (9th Cir. 1994).

HB 142's absolute prohibition of the admission of extra-record evidence in judicial proceedings challenging the adequacy of an EIS is inconsistent with this caselaw,[1] and would make it difficult for a citizen to challenge the adequacy of an EIS. In order to do so citizens would either have to conduct and disclose to the agency a comprehensive independent environmental study of the proposed action prior to the completion of the agency's study, or at a minimum correctly anticipate where the flaw in the agency's EIS would arise and study that issue. All this would have to occur even before the citizen had any idea of what the agency's position might be. Such a requirement appears to be inconsistent with the general policy of MEPA which places an affirmative duty on the agency to identify and study environmental impacts. See Mont. Code Ann. § 75-1-201(1).

Moreover, it is unclear to me why existing principles of judicial review are inadequate to deal with instances of "sandbagging." The case cited by DNRC as the basis for this part of HB 142, Vermont Yankee v. Natural Resources Defense Council, 435 U.S. 519 (1977), involved a situation where "sandbagging" was disallowed. There, the NRDC had raised vague concerns before the Federal Power Commission about whether it should study "energy conservation" as an alternative to licensing a nuclear power plant. In the ensuing challenge to the FPC's EIS, NRDC specifically claimed that the FPC's failure to study conservation made its EIS inadequate. The Supreme Court rejected this argument, explaining that

> [W]hile it is true that NEPA places upon an agency the obligation to consider

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[1]It is also inconsistent with general principles of judicial review in the Montana Administrative Procedures Act. While judicial challenges to agency MEPA compliance do not arise under MAPA (see North Fork Pres. Ass'n v. Dep't of State Lands, 778 P.2d 862, 865-66 (Mont. 1989), in proceedings to review agency actions that do fall under MAPA district courts have the authority to remand the matter back to the agency for receipt of additional evidence. See Mont. Code Ann. § 2-4-703.

> every significant aspect of the environmental impact of a proposed action, it is still incumbent on intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position, and contentions. . . . [Comments] must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . it must show why the mistake was of possible significance in the results. . . . We do not [however,] equate this burden with the civil litigation concept of a prima facie case, an unduly heavy burden in this setting. But the showing should be sufficient to require reasonable minds to inquire further.

435 U.S. at 553; see also MWA v. Bd. Nat Res., 648 P.2d at 746. HB 142's strict evidence exclusion rule goes a lot further than Vermont Yankee, essentially requiring citizens to put on their case-in-chief even before they have any idea what the agency's position might be. At a minimum that seems wasteful. But more important, Vermont Yankee illustrates that under existing principles of judicial review, state agencies have tools to prevent "sandbagging." Finally, while the result of HB 142 would certainly reduce the possibility of "sandbagging" by citizens, it would make it exceedingly easy for a state agency to do just the opposite.

The requirement in HB 142 that citizens raise their "issues" before the agency is both consistent with existing caselaw and not of great concern. However, the absolute exhaustion requirement with respect to "evidence" is overbroad and should be deleted from HB 142.

2. **Exemption Of DNRC's "Ministerial" Functions From MEPA.** The other aspect of HB 142 has to do with exempting DNRC from MEPA for what it characterizes as "ministerial" functions such as lease renewals and assignments. Thus a new subsection (d) is to be added to Mont. Code Ann. § 75-1-201(1) which specifically provides that:

> [A] transfer of an ownership interest in a lease, permit, license, or other entitlement for use or permission to act by an agency, either singly or in combination with other agencies, does not trigger review [under MEPA] if there is not a material change in term [sic] condition of the entitlement or unless otherwise provided by law.

Section 2 of HB 142 (which I will not quote in full here) goes on to specifically exempt TLMD from MEPA compliance where it is not "actively proposing" a specific category of actions, and most significantly provides that

> [DNRC] and the [Land] [B]oard do not have an obligation to comply with

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act, manage, or regulate and knowledge of ongoing or potential environmental harm.[3] DNRC explains that it is necessary to do this in order to clarify that the Ravalli County Sportsmen Ass'n decision does not automatically require MEPA compliance every time a lessee changes crop rotations or grazing practices. However, the Court's decision that MEPA compliance was required there was based on a coincidence of three factors which I'm not persuaded will arise in most routine situations. Section 2 of HB 142 should either be deleted or amended to more narrowly address DNRC's specific management concern.

I have prepared amendments to HB 142 which address most of the concerns discussed above. They are attached. Please let me know if you have questions or wish to discuss this further.

cc: Steve Bullock
Jeff Hagener
Rusty Harper

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[3]As a more technical comment, in attempting to comprehensively list all of the activities which it considers to be MEPA "actions" in paragraph (1) of Section 2 of HB 142, DNRC creates a serious risk of underinclusion, i.e., there may be other things that TLMD "actively proposes" which would otherwise be "actions" under MEPA, but are exempt because they weren't listed in Section 2(1).

> [MEPA] when implementing provisions within Title 77 if [DNRC] or the [B]oard chooses not to take any action, even though either may have the authority to take an action.

DNRC explains that the intent behind these two provisions is to codify the Montana Supreme Court's decision in Ravalli County Fish & Game Ass'n v. Mont. DSL, 903 P. 2d 1362 (Mont. 1995) and to clarify that it does not have to comply with MEPA every time a lessee changes grazing practices or renews or assigns her lease.

In Ravalli County Sportsmen Ass'n, the Supreme Court held two things of importance here: (1) that purely ministerial actions such as lease renewals or assignments do not constitute "actions" under MEPA where they do not change the status quo (id. at 1367); and (2) that in that case, since DSL had an affirmative duty under Mont. Code Ann. § 77-6-201(2) to manage state lands for multiple-use purposes including wildlife, ***and*** that it had specific knowledge of a change in grazing practices by one of its lessees ***and*** that the change had the potential for creating environmental harm, it had the duty to comply with MEPA. 903 P.2d at 1368.[2] Both of these aspects of the Court's decision appear to be consistent with NEPA caselaw. While the general rule is that agency inaction is not a "action" for NEPA-compliance purposes (see Mandelker, supra at § 8.05[3]), the principal exception to that rule arises where an agency has an affirmative duty to act, regulate, manage or otherwise prevent a particular type of environmental harm and fails to do so. See Ramsey v. Kantor, 96 F. 3d 434, 445 (9th Cir. 1996) (mandatory duty of federal agency to approve state plans makes refusal to approve major federal action); Sierra Club v. Hodel, 848 F. 2d 1068, 1090 (10th Cir. 1988) (same).

If DNRC's intent is simply to "codify" the holding in the Ravalli County Fish & Game Ass'n. case, all that is necessary is the new subsection (d) in Mont. Code Ann. § 75-1-201(1). Section 2 overturns the second part of the Montana Supreme Court's decision and exempts TLMD from MEPA compliance for any decision not to take an action even where it has an affirmative duty to

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[2]In my view, if there are any management problems flowing from the Ravalli Fish & Game Ass'n. case those problems do not stem from the Court's unexceptional interpretation of MEPA but from how substantively it interpreted DNRC's duties to consider "other and related resources such as . . . game animals" under Mont. Code Ann. § 77-6-201(2). Another possible reading of § 77-6-201(2) is that it simply requires the agency to conduct periodic "appraisals"of state grazing lands for purposes of setting lease rates and optimizing grazing practices, but does not itself impose substantive responsibilities on DNRC relative to wildlife protection.

1999 Montana Legislature

DRAFT

HOUSE BILL NO. 142

INTRODUCED BY ANDERSON S

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE TREATMENT OF A TRANSFER OF OWNERSHIP PURSUANT TO THE MONTANA ENVIRONMENTAL POLICY ACT; LIMITING A COURT'S SCOPE OF REVIEW FOR AN ACTION OR CHALLENGE THAT AN ENVIRONMENTAL STATEMENT OR REVIEW IS NOT REQUIRED OR THAT THE STATEMENT OR REVIEW IS INADEQUATE; CREATING EXEMPTIONS FROM THE PROVISIONS OF THE MONTANA ENVIRONMENTAL POLICY ACT FOR ACTION TAKEN UNDER TITLE 77, MCA; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-1-201, MCA, is amended to read:

"**75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The

responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer or renewal of an ownership property or use interest in under a lease, permit, license, certificate, or other entitlement for use or permission to act authorization previously granted by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) In any action challenging or seeking review of an agency's ~~determination~~ decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. In a challenge to the adequacy of a statement, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law."

NEW SECTION. **Section 2. Environmental review -- exemption.** (1) The department and board are required to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 only if the department is ~~actively~~ proposing to issue a sale, exchange, right-of-way, easement, placement of improvement, lease, license, permit, or other authorization for use of state lands or is acting in response to an application for an authorization.

(2) Except for rulemaking and as provided in subsection (1), the department and board are otherwise exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77, including but not limited to the issuance of lease renewals. ~~Except where the department and board have a specific statutory duty to avoid environmental harm and specific knowledge that such harm may arise when the department or board do not act.~~ The department and board do not have an obligation to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 if the department or board choose not to take any action, even though either may have the authority to take an action.

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EXHIBIT E
DATE 1/25/99
HB 142

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Montana Audubon

P.O. Box 595 Helena, MT 59624 • 406-443-3949

Testimony on HB 142
House Natural Resources Committee
January 25, 1999

Mr. Chairman and Members of the Committee,

My name is Janet Ellis and I'm here today representing Montana Audubon. Montana Audubon is composed of nine Chapters of the National Audubon Society and has approximately 3,200 members.

The Audubon Fund opposes HB 142.

The Montana Environmental Policy Act (MEPA) is Montana's most important environmental law. It requires us to examine a "major action of state government: and its affect on our environment." A "major action of state government" is defined as an action "significantly affecting the quality of the human environment." Such actions require the preparation of an environmental review - a process that allows alternatives to be examined and the public to have a voice when something "significant" is about to happen to their environment.

This policy makes sense. It allows Montanans to stop and think and plan for the future. It is a good state policy to examine things closely when something "significant" is about to happen to our environment.

HB 142 proposes to exempt many of the activities of the land Board and on school trust land from MEPA. It is difficult to know what activities would and would not be exempt under this legislation - so it is difficult to determine if these activities would "significantly" affect our environment.

We do not feel that statutorily exempting anything from MEPA is a good policy - and that there are better ways to accomplish what we understand DNRC wants to do.

• **Statutory Exemptions**. Currently there are only 5 statutory exemptions from MEPA:

1. Actions of the Legislature
2. Public Service Commission regulatory activities;
3. In timber sale emergency situations or time dependent access situations involving timber, to the extent that the Department of Natural Resources and Conservation's compliance with MEPA is precluded by limited time;
4. Issuance of a historic right-of-way deed; and
5. Certain changes to hard rock mining operating permits.

The advantage of a statutory exemption is that the agency never has to use MEPA. The disadvantage of a statutory exemption is that if a situation arises that warrants MEPA review, the agency will not do it.

Generally, when an agency feels that an activity should not be subject to MEPA, it does not ask for a statutory exclusion. Instead, it does a programmatic review or asks for a categorical exclusion. Programmatic reviews and categorical exclusions are set up as flexible tools in MEPA

that allow agencies to develop a quick environmental check list for activities or exclude certain categories - or groups - of act ivies from extensive environmental reviews.

• **Programmatic Environmental Review.** DNRC can, under its adopted MEPA rules (Rule XVII(1)) conduct a programmatic EA or an EIS. "Whenever an agency is contemplating a series of agency-initiated actions, programs, or policies which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing he impacts of the series of actions.

• **Categorical Exclusions.** DNRC can categorically exclude activities from MEPA under its existing rules. (Rule III (5) of the model MEPA rules adopted by DNRC identifies six situations where there is no need for environmental review.) What this would involve is that DNRC go through rulemaking to categorically exclude certain activities from MEPA. They would be required to define the activities that should be exempt from MEPA in a proposed rule.

The advantage of doing MEPA compliance through a programmatic or categorical exclusion is that DNRC would have to outline the conditions under which activities would be excluded from MEPA. And if circumstances arise that warrants MEPA review, the agency would be able to do an environmental review.

So what about activities on state lands? Is it prudent to decide that these activities will never "significantly" affect our environment? We think not.

MEPA is Montana's environmental safety net. Planning is essential as Montana continues to grow. HB 142 predetermines the answer to the key questions MEPA asks. This is bad policy, for we cannot know the answer unless we ask the question. And there is no harm in asking the question unless we fear the answer.

Montana Audubon urges you to vote "Do Not Pass" on HB 142 and continue to protect Montana's environment. We feel that DNRC should go through the rulemaking process to categorically exclude gravel crushers from MEPA.

Thank you.

75-1-201. General directions -- environmental impact statements. (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) In any action challenging or seeking review of an agency's determination that a statement pursuant to subsection (1)(b)(iv) is not required, the burden of proof is on the person challenging the decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

History: En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch. 473, L. 1987; amd. Sec. 1, Ch. 566, L. 1989; amd. Sec. 1, Ch. 331, L. 1995; amd. Sec. 3, Ch. 352, L. 1995; amd. Sec. 177, Ch. 418, L. 1995; amd. Sec. 67, Ch. 545, L. 1995.

77-5-201. Sale of timber. (1) Under the direction of the board, the department may sell the timber crop and other crops of the forests after examination, estimate, appraisal, and report and under any rules established by the board.

(2) Timber proposed for sale in excess of 100,000 board feet must be advertised in a paper of the county in which the timber is situated for a period of at least 30 days, during which time the department must receive sealed bids up to the hour of the closing of the bids, as specified in the notice of sale.

(3) (a) In cases of emergency due to fire, insect, fungus, parasite, or blowdown or in cases when the department is required to act immediately to take advantage of access granted by permission of an adjoining landowner, timber proposed for sale not in excess of 1 million board feet may be advertised by invitation to bid for a period of not less than 10 days. The department may reject any or all bids, upon approval of the board, or it shall award the sale to the highest responsible bidder.

(b) (i) In cases when the department is required to act immediately to take advantage of access granted by permission of an adjoining landowner and there is only one potential buyer with legal access, the department may negotiate a sale of timber not in excess of 1 million board feet without offering the timber for bid if the sale is for fair market value.

(ii) The provisions of subsection (3)(b)(i) do not apply to situations when the only access is totally controlled by a potential purchaser of the timber, in which case the department shall seek to negotiate permanent, reciprocal access.

(c) In the situations described in subsections (3)(a) and (3)(b)(i), the department is not required to comply with the provisions of 75-1-201(1) to the extent that compliance is precluded by limited time available to take advantage of the sales opportunities described by this subsection (3).

History: En. Sec. 4, Ch. 179, L. 1925; re-en. Sec. 1830.4, R.C.M. 1935; amd. Sec. 98, Ch. 253, L. 1974; amd. Sec. 1, Ch. 301, L. 1977; R.C.M. 1947, 81-1404(part); amd. Sec. 1, Ch. 529, L. 1981; amd. Sec. 1, Ch. 139, L. 1983; amd. Sec. 1, Ch. 223, L. 1995.

77-1-130. *(Temporary)* Recognition of historic right-of-way -- criteria for right-of-way deed -- conditions -- fees. (1) A person or a county may apply to the department for a historic right-of-way deed to provide access to the applicant's private property or to provide continuation of a county road by filing an application with the department by October 1, 2001, on a form prescribed by the department. An application must be accompanied by:

(a) an application fee of $50;

(b) a notarized affidavit:

(i) demonstrating that the applicant or the applicant's predecessor in interest used the right-of-way applied for before 1973 and that the use has continued to the present;

(ii) describing the purpose for which the right-of-way was used before 1973; and

(iii) demonstrating that the historic right-of-way applied for is the right-of-way demonstrated in the evidence provided in subsection (1)(c); and

(c) (i) aerial photographs taken by an agency of the United States demonstrating use of the right-of-way applied for; or

(ii) other evidence of the use of the right-of-way applied for.

(2) The department shall review an application and other evidence submitted pursuant to subsection (1) and shall issue a historic right-of-way deed in the name of the applicant if:

(a) the applicant pays the application fee provided in subsection (1)(a) and the fair market value of the historic right-of-way as provided in subsection (4);

(b) the applicant has shown by substantial evidence the matters required in subsections (1)(b) and (1)(c)(i) or (1)(c)(ii);

(c) the department has, if necessary, made a field inspection of the right-of-way applied for; and

(d) the deed is approved by the board.

(3) A historic right-of-way deed issued in the name of the applicant must contain the description of the property of the applicant to which it is appurtenant as provided in the application, and the right-of-way must thereafter be considered appurtenant to that dominant estate. A deed may be assigned by the applicant to the applicant's successor in interest with the approval of the department. The department may not require a fee for the approval of an assignment and may not withhold approval for any reason other than that the use of the historic right-of-way is contrary to subsection (5).

(4) (a) At the time of issuing the historic right-of-way deed, the department shall collect from the applicant the full market value of the acreage of the historic right-of-way based on the following classifications of land:

(i) $37.50 per acre for state land classified as grazing land;

(ii) $275 per acre for state land classified as timber land;

(iii) $100 per acre for state land classified as crop land; and

(iv) $100 per acre for other land.

(b) Amounts collected pursuant to subsection (4)(a) must be deposited in the appropriate trust fund established for receipt of income from the land over which a historic right-of-way is granted.

(5) If application is made in accordance with this section, a historic right-of-way deed must be issued by the department, subject to the approval of the board, on the following terms:

(a) the right-of-way is only for the minimum width necessary, as negotiated by the department and the applicant; and

(b) the right-of-way is only for the physical condition of the road existing on the date the historic right-of-way deed is issued by the department.

(6) Issuance of a historic right-of-way deed pursuant to this section is exempt from the requirements of Title 75, chapter 1, parts 1 and 2, and Title 22, chapter 3, part 4.

(7) The survey requirements of 77-2-102 may be waived by the department for the issuance of a historic right-of-way deed if the department determines there is sufficient information available to define the boundaries of the right-of-way for the purposes of recording the easement.

(8) The department may attach conditions to a historic right-of-way deed necessary to ensure compliance with this chapter. However, the department may not require reversion of the right-of-way to the state.

(9) For the purposes of this section, "historic right-of-way deed" means a document issued by the department granting to the applicant a nonexclusive easement over state land. *(Terminates October 1, 2003--sec. 5, Ch. 461, L. 1997.)*

History: En. Sec. 1, Ch. 461, L. 1997.

HARD ROCK

82-4-342. Amendment to operating permits. (1) During the term of an operating permit issued under this part, an operator may apply for an amendment to the permit. The operator may not apply for an amendment to delete disturbed acreage except following reclamation, as required under 82-4-336, and bond release for the disturbance, as required under 82-4-338.

(2) The board may by rule establish criteria for the classification of amendments as major or minor. The board shall adopt rules establishing requirements for the content of applications for major and minor amendments and the procedures for processing minor amendments.

(3) Applications for major amendments must be processed pursuant to 82-4-337.

(4) The department shall review an application for a minor amendment and provide a notice of decision on the adequacy of the application within 30 days. If the department does not respond within 30 days, then the permit is revised in accordance with the application.

(5) The department is not required to prepare an environmental assessment or an environmental impact statement for the following categories of action:

(a) actions that qualify for a categorical exclusion as defined by rule or justified by a programmatic review pursuant to Title 75, chapter 1;

(b) administrative actions, such as routine, clerical, or similar functions of a department, including but not limited to administrative procurement, contracts for consulting services, and personnel actions;

(c) repair or maintenance of the permittee's equipment or facilities;

(d) investigation and enforcement actions, such as data collection, inspection of facilities, or enforcement of environmental standards;

(e) ministerial actions, such as actions in which the agency does not exercise discretion, but acts upon a given state of facts in a prescribed manner;

(f) approval of actions that are primarily social or economic in nature and that do not otherwise affect the human environment;

(g) changes in a permit boundary that increase disturbed acres that are insignificant in impact relative to the entire operation, provided that the increase is less than 10 acres or 5% of the permitted area, whichever is less; and

(h) changes in an approved operating plan or reclamation plan for an activity that was previously permitted, provided that the impacts of the change will be insignificant relative to the impacts of the entire operation and there is less than 10 acres of additional disturbance.

EXHIBIT 9
DATE 1/25/99
HB 142

9

Here is my testimony in full... and the second page is an analysis of the bill
HB 142 Testimony

Mr. Chairman, Members of the Committee... I'm Tary Mocabee for Friends of the Wild Swan.

I have personal experience with public participation with the DNRC And this interactive, evolving process was crucial to arriving at a workable outcome. THIS was government by the people.

The Montana Constitution provides for a system of checks and balances. I feel this bill is drifting away from those balances, not just for environmental issues but for farmers, people with water rights, property owners. Not all facts are present at the outset of these state projects. There are a lot of dynamics .at work here: land, animals, water, views...

Truth is being revealed on these projects all the time. For you, as a legislative body to make a law that all the facts must be present at the beginning

Regarding my experience with the DNRC-- I live on a ranch in an area called "North Crow" at the base of the Missions, land nearby was to be logged on state school trust land. At the beginning of this process only a few property owners were notified of the proposal And the official classified ad in the paper called it "Two Crow"--no one in my valley knows a place called Two Crow. Despite this erroneous start. both the DNRC and we as a community learned more and more about this sale.

There were a number of issues brought up all along the way with this timber sale--issues important to us as citizens --these issues were enough of red flags that staffers of the Land Board came over for a second land tour. An amended EA was drafted due to OUR input that resulted in only having to build half the road that was initially proposed because we showed them they could use the old skid trails at the site.. This saved the agency money and time.

We did finally arrive at a workable solution. And the integrity of MEPA helped create that solution.

The system of checks and balances works. It's the heart of our constitution. Take away those checks and balances and you have a stifled citizenry--not government by the people. If this bill is adopted it will have huge, negative ripple effects.

Public participation is crucial to natural resource decisions. You take away that right and where are we headed? Whose government is this?

EXHIBIT 10
DATE 1/25/99
HB 142

10

Excerpts of Analysis of HB 142, by Jack Tuholske, Attorney at Law, for Friends of the Wild Swan

First, HB 142 adds a new section under 75-5-201 (d) that exempts from MEPA review a transfer of a lease if there is not a material change of conditions. In the vast majority of cases the simple transfer of a lease will NOT cause MEPA review. The "Sheep vs. Sheep" case cited by Mr. Clinch at the hearing was an exception where an out of state land owner switched his lease from cattle to sheep, endangering a prized herd of wild big horns from disease transmission.

Second, the bill adds a prohibition in section (d) (3) that is offensive to all citizens. By requiring persons to present "all evidence" to the agency the amendment puts all citizens at a disadvantage. For example: let's say the Mont. Dept of Highways prepared an Environmental Assessment on a highway section. A rancher whose lands are traversed by the highway doesn't like it, but doesn't understand the process and writes only a brief letter against it. The EA sits for a few years, then suddenly the project is a go. Now the rancher is concerned because the Department. didn't consider the impacts of cutting his ranch in half, and a better alternative exists. He hires an expert who confirms the damage to his operation and the feasibility of the other alternative. This rancher is now shut out from the court - he can't even get a court to listen to his evidence. Meanwhile the Department's lousy decision proceeds with impunity.

Similar situations can arise. The Department is saying with this amendment that the judges of our state don't have the ability to decide what evidence is relevant, and whether the citizen should have presented to the agency first. It robs the judiciary of any independent function or oversight by preventing judges from even considering evidence. The Department, fearing that it cannot defend its decisions in court now seeks to shut people out of the courthouse, to insulate the agency from challenge.

To summarize: this bill offends traditional notions of public involvement and independent judicial review. It is a petty attempt to override decisions of the Montana Supreme Court. It gives big government the upper hand at the expense of ordinary citizens. It addresses problems that do not exist. It should be rejected as an affront to the democratic process.

If you'd like the whole analysis please call me at 676-5169. I'd be glad to send it to you. I hope this sheds some light on this somewhat unwieldy bill.

Sincerely, Tary Mocabee

EXHIBIT 11
DATE 1/25/99
HB 142

Disease found in few Turner bison

Johne's disease: More than 600 tests for fatal wasting illness on the Flying D still to come in

By OLIVER STALEY
Chronicle Staff Writer

Partial test results on bison at Ted Turner's Flying D Ranch indicate that few of the animals have Johne's disease.

The fatal wasting disease was found in seven of the 1,732 bison whose test results are in, ranch manager Russ Miller said Tuesday.

Dr. Arnold Gertonson, the Montana state veterinarian, confirmed the Flying D's numbers.

The ranch is in the process of rounding up the infected animals and destroying them, Miller said.

That only .4 percent of the tests have come back as positive is good news, he said.

"It's better perhaps than what we expected," Miller said.

However, the ranch is still waiting for the results of tests on another 681 animals, which are expected back by July.

Additionally, the Montana Department of Fish, Wildlife and Parks has yet to receive test results from 130 elk killed last fall and winter near the Flying D. The state agency is concerned that the disease has spread to the wild elk population.

FWP wildlife biologist Kurt Alt said that while the small number of infected bison could be a good sign, he didn't want to make any definitive judgments until all the results are back.

"I'm not overly optimistic; I'm not overly pessimistic," Alt said.

Wildlife advocates have expressed concern that Johne's disease could run rampant if exposed to wild elk.

Symptoms of Johne's disease include diarrhea and weight loss. Livestock with the bacterial infection, which is uncommon in Montana, are often destroyed to prevent further spreading. There is no evidence that Johne's disease can be passed to humans.

The disease is believed to be passed through feces, and therefore is more prevalent in herds where animals are closely packed together.

"If you have them out on pasture, there's less chance of them coming into contact with the infectious material," Gertonson said.

There is no vaccine to prevent the disease, and the only known way of limiting its spread is destroying infected animals.

Miller said the ranch plans on continuing testing its herd to make sure the sickness won't spread in the future. However, at $20 a test, the Flying D may in the future scale back its testing efforts from every animal to a representative sample.

BOZ. CHRON. 5-29-98
> CAN BE EASILY TRANSMITTED TO NATIVE ELK
> WHAT ABOUT OUR ELK! IT'S UNLAWFUL INCL.
- OCCURRED IN COLORADO C BY ACT OF 1885 /
IF IN OUR ELK WHO IS LIABLE ? ? ?
WHAT HAPPENED TO MULE DEER ON THE FLYING D?

OVER please

Bozeman Daily Chronicle
Wednesday, January 28, 1998

Wild elk tested for Johne's disease

By OLIVER STALEY
Chronicle Staff Writer

State biologists are testing the wild elk population near Ted Turner's Flying D Ranch out of concern that a disease may have spread from the ranch's bison, although tests on the bison have so far proven negative.

Symptoms associated with the fatal livestock disease, including weight loss and diarrhea, have been found in 30 to 40 of the 3,200 bison on Turner's ranch south of Bozeman, said ranch manager Russ Miller. [illegible]

There is no cure for Johne's disease, which affects ruminants. Livestock with the bacterial infection, which is uncommon in Montana, are often destroyed to prevent further spreading. There is no evidence that Johne's disease can be passed to humans.

To date, results from tissue culture tests — the most accurate test, Miller said — performed for Johne's disease on two dead bison have been negative. Tissue culture test results performed on another 12 sick bison killed by the ranch are expected back by the end of February, he said.

"If none (of the bison) had Johne's, then we'd look a little more systematically at what it could be," Miller said. "(Tests) could lead to a mineral deficiency problem, it could be an immuno-suppression disease."

But while the source of the bison's illness is still not known, the Montana Department of Fish, Wildlife and Parks is proceeding with tests on more than 100 elk killed in the last hunting season, said wildlife biologist Kurt Alt.

"Knowing that the ranch is being challenged by something, we have collected blood and fecal samples from harvested elk, to do a broad background check," Alt said. "We're not looking for anyone thing. We're looking at what they've been exposed to."

The wild elk population and the bison on the Flying D Ranch do mingle, he said, although no symptoms of Johne's disease have been found in the elk.

"In the wintertime, they tend to gravitate to the same types of slopes, and there is some interaction," Alt said. "If there's enough to facilitate a transfer of disease, that's yet to be determined."

The possibility that a disease could be transmitted from the Flying D's bison to the native elk population concerns the Montana Wildlife Federation, a Helena-based environmental group.

"We're watching it relatively carefully, waiting to see what's going on," said Tony Jewett, executive director of the organization.

The worry is a fatal and incurable disease running rampant through Montana's wild elk population.

"It's absolutely unpredictable what could happen, depending what the disease is," he said. "You cannot unequivocally say a disease is not going to spread. It's like whirling disease on the rivers."

So far, however, whatever is affecting the Flying D's bison has had a limited impact, Miller said.

"Basically, in the overall scheme, the herd is healthy," he said.

Nonetheless, the ranch is proceeding not only with the tissue culture tests from the sick bison they have killed, but with fecal samples from all 1,300 mature bison on the ranch, Miller said. Similar tests are being performed on a ranch Turner owns in Nebraska, where a number of the Flying D bison have been shipped.

The ranch is prepared to destroy any bison in which the disease is present.

"Based on the result, the animals will either live or we will kill them," Miller said.

The fecal culture tests are not expected back until mid-March, Miller said.

HOUSE OF REPRESENTATIVE
ROLL CALL

NATURAL RESOURCES COMMITTEE

DATE 1-25-99

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bill Tash, Chairman	✓		
Rep. Hal Harper, Vice Chair	✓		
Rep. Cindy Younkin, Vice Chair	✓		
Rep. Rod Bitney	✓		
Rep. Aubyn Curtiss	✓		
Rep. Rick Dale	✓		
Rep. Bill Eggers	✓		
Rep. Ron Erickson	✓		
Rep. David Ewer	✓		
Rep. Gail Gutsche	✓		
Rep. Joan Hurdle	✓		
Rep. Dan McGee	✓		
Rep. Douglas Mood	✓		
Rep. Karl Ohs	✓		
Rep. Scott Orr	✓		
Rep. Bob Raney	✓		
Rep. Bob Story	✓		
Rep. Jay Stovall	✓		
Rep. Carley Tuss	✓		
Rep. Doug Wagner	✓		

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Natural Resources COMMITTEE BILL NO. 142

DATE 11/25/99 SPONSOR(S)

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Tommy Butler	DNRC	✓	
Ina T. Yoder	RAVALLI COUNTY FISH & WILDLIFE ASSOC		X
Art Callen	Bitterroot Chapter Mule Deer Found.		✓
BILL HOLDORF	2610 STATE ST BUTTE		✓
Gary Hegreberg	Wood Products	✓	
Larry Morell	Friends of the Wild Swan		✓
Bob Clinch	DNRC	✓	
[illegible]	MT Assn Planners		
BETTY WADDELL	MT ASSOC OF CHURCHES		✓
Dan Jamison	Montana Wildlife Federation		X
Joe Kerwin	Sec of State		X
Tamara Troyer-Kins	Cottonwood Resource Council		X
Jim Mockler	MT Coal Council	✓	
Art Noonan	Sierra Club		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Natural Resources COMMITTEE BILL NO. 142

DATE 1/25/99 SPONSOR(S)

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Hoving Hems	AG		✓
Janet Ellis	MT Audubon		✓
JERRY WELLS	Trout Unlimited		—
Anne Hedges	MEIC		✓
Darrell Baker	Anaconda Sportsman		—
BILL SAVODY	McDONALD GOLD	✓	
John Bloomquist	MT. Stockgrowers	✓	
John Youngberg	Mt. Farm Bureau		
Tony Schoonen	State Lands Coalition Public Land Access		✓
Karl Ohrenbrecker	MT Petroleum Assn	✓	
JOE LAMSON	OFFICE PUBLIC INSTRUCTION		✓
Don Allen	WETA	✓	
Rusty Harper	Dept. Livestock Off		✓
L. F. Thomas	ANACONDA SPORTSMAN		✓

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LEGISLATIVE TAPE LOG

COMMITTEE: Tape 1 Natural Resources (1)
DATE: Side A 1-25-99

MINUTES	CONTENT NOTES
01.-4.4	Hearing on HB 172 Sponsor Rep. Shiell Anderson Exhibit 1
4.4-18.4	Pro: Bud Clinch, Director DNRC
18.6-28.3	Pro: John Blomquist, Mt. Stockgrowers Assoc.
28.3-34.3	Pro: Cary Hegreberg, Mt. Wood Products Assoc. Exhibit 2 Gail Abercrombie, Mt Petroleum Assoc
28.3-34.3	Don Allen Western Environmental Trade Assoc.
____	Jim Mockler Mt. Coal Council Jill Andrews Mt. Mining Assoc. Bill Snoddy, Govt. Affairs
____	Opp: Shea Holt Ravalli County Fish & Wildlife Assoc.
34.3-43.8	Opp: Schoonen Butte, State Lands Coalition / Exhibit 3
46.5-51.9	Opp: Tamara Troyer, Montana Resource Council
____	Opp: Van Jamison, Mt. Wildlife Fed.

LEGISLATIVE TAPE LOG

COMMITTEE: Tape 1 Natural Resources (2)

DATE: Side B 1-25-99

MINUTES	CONTENT NOTES
	Op: Hanly Harris, Asst. Attorney General
	Op: Rusty Harper St. Auditor's Office & Mark O'Keefe
	Op: Janet Ellis, Mt. Audubon
	Op. Jay Moorhee Friends of the Wild Swan
5.2	Op: Joe Kerwin, Dep. Secy of State
	Op: Art Noonan Sierra Club Op: Bill Dolan Butte Skyline Club Op: Joe Lombardi, OPI
	Op: Betty Waddell Mt. Assoc. Churches Op: L.J. Thomas, Anaconda Spartans Op: Jay Wells, Mt. Council of Trout, Un
	Op: Art Caplan Bitterroot Chapter of Mule Deer Foundation Op: Dale Canterright, Anaconda Sport
	Op: Ron Cunningham Mt. River Action Network
	Question: Rep. Raney - Rep. Anderson

LEGISLATIVE TAPE LOG

COMMITTEE: Natural Resources (3)

DATE: 1-25-99

Type 1 Side B

MINUTES	CONTENT NOTES
9.8-13	Rep. Dale,
13-16.5	Rep. Ohs
17.5-21.4	Rep. Hurdle, Rep. Story, Rep. Erickson, Rep. Ramsey
	Type 2 Side A
	Rep. Curtis
	Closing by Sponsor, Rep. Anderson
10.2	Hearing on HB 298 Sponsor: Rep. Don Larson
	Pro: None
17.1	Opp: Mark Simonich, Dir. D. of E.Q.
	Opp: Jon Miles, L. & C. County Health Dept.
	Questions: Rep. McGee,

LEGISLATIVE TAPE LOG

COMMITTEE: Natural Resources (4)

DATE: 1-25-99

MINUTES		CONTENT NOTES
	Tape 2 Side A	Rep. Fuchs closed the Hearing on HB298
		Hearing on HB300. Sponsor Rep. Karl Ohs
34.9		Pro: Jane Jelinski, Mt. Assn of Counties
		Pro: Howard Gipe, Flathead City Comm.
37.9		Pro: Allen McCormick Assoc Planner, L & C County
		Pro: Angie Hedges, Mt Environmental Info Center
		Opp: Dick Ainsworth, Land Use Planner, Msla
53.9		Questions: Rep. Erickson Rep. McGee Rep. Dale, Ms. Jelinski
	Tape 2 Side B	Rep. Ohs closed the Hearing on HB300

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN BILL TASH**, on February 3, 1999 at 3:10 P.M., in Room 437 Capitol.

ROLL CALL

Members Present:

Rep. Bill Tash, Chairman (R)
Rep. Hal Harper, Vice Chairman (D)
Rep. Cindy Younkin, Vice Chairman (R)
Rep. Rod Bitney (R)
Rep. Aubyn A. Curtiss (R)
Rep. Rick Dale (R)
Rep. Bill Eggers (D)
Rep. Ron Erickson (D)
Rep. David Ewer (D)
Rep. Gail Gutsche (D)
Rep. Joan Hurdle (D)
Rep. Dan McGee (R)
Rep. Douglas Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Story (R)
Rep. Jay Stovall (R)
Rep. Carley Tuss (D)
Rep. Doug Wagner (R)

Members Excused: Rep. Bob Raney (D)

Members Absent: None.

Staff Present: Deb Thompson, Committee Secretary
Kathleen Williams, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 423, 2/6/1999
Executive Action: HB 298, HB 331, HB 300, HB 142

who has to haul water. Rep. Bitney replied that a buyer has rights and real estate practitioners must give full disclosure. ***{Tape : 1; Side : A; Approx. Time Counter : 55.1}***

Rep. Hurdle said the bill was based on an incident that happened to the sponsor's father because of a required cistern. Director Siminich noted the department does not require cisterns. They look at the tract to determine if the quantity and quality of the water supply is adequate, if not it is disapproved. The proposal could then be modified and could include the use of a cistern. He pointed out the problem for individuals who found out at a later time that their water supply was not adequate and would require a substantial cost to locate an alternate water supply.

Rep. Hurdle **MOVED TO TABLE HB 298.** The motion **PASSED** 13-7. ***{Tape : 1; Side : B}***

EXECUTIVE ACTION ON HOUSE BILL 331

Rep. Curtiss **MOVED DO PASS.** Rep. McGee discussed the terms "institutional control" or "remedy". Rep. Curtiss pointed out the hearing had no opponents. The bill was practical and a cost effective way to protect the environment.

The question was called. The motion **PASSED** 19-1 with Rep. Wagner voting no.

EXECUTIVE ACTION ON HOUSE BILL 300

Rep. Ohs **MOVED DO PASS HB 300.** Rep. Younkin said 60 working days was too long when considering weekends and holidays. Rep. Ohs replied this was a reasonable time. Small counties have small staff with lots of subdivision work.

The question was called. The motion **PASSED** with 4 no votes by Reps. Younkin, McGee, Orr and Wagner.

EXECUTIVE ACTION ON HOUSE BILL 142

Rep. Curtis **MOVED DO PASS HB 142.** ***{Tape : 1; Side : B; Approx. Time Counter : 17.7}*** **EXHIBIT(7), EXHIBIT(8)**

Rep. Ewer explained if the public thinks an EIS is not a good job it could be litigated. The bill would say the scoping ends with the department, you can't expand the scope of the environmental assessment in district court.

Rep. Curtiss pointed out the issue needs finality. The Department of State Lands has a fiduciary responsibility where the money goes to education and the university system. It has become obvious that nuisance issues have been raised. She referred to the sheet from the department that lists those cases (see Exhibit 7). ***{Tape : 1; Side : B; Approx. Time Counter : 21.9}***

Rep. Curtiss MOVED the amendment **EXHIBIT(9)**.

Rep. Younkin supported the amendment because it added definitiveness and gives guidance. She stated, if it is a problem it will be addressed and if it is fluff it won't be addressed. Chairman Tash pointed out the amendments clear up confusion of how MEPA is applied and how extensively.

Rep. Mood noted this would leave room within MEPA for circumstances such as the Sheep versus Sheep case.

Rep. Eggers spoke about the amendment where it may bar access to the courts. He read lines from the Constitution. He asked the committee to think about how the Constitution prohibits barring people from the court. He noted if a person brings up a latent discovery, an after the fact discovery, they should have access to the courts and the courts should exercise its discretion to determine whether the information is material, substantive and whether it is deserving of a remand back to the agency for consideration and an opportunity to modify.

Chairman Tash said this was a good point and should be addressed. Todd Everts suggested a threshold decision be made up front by the district court regarding the facts being material or substantive.

Rep. Story said it seems that the complainant has access to the court system. They come in with information they don't think has been considered by the department, they take it to the court and the court remands it back to the department. It stays in the loop until most of it gets solved.

Rep. Eggers said the court is given the discretion to weigh the evidence, make determinations and either make referrals or deny referrals or consider issues that are substantive. If a hearing is not allowed, an appeal can be made. Everyone should get their rights preserved and not cut the court off if someone needs it.

Rep. Wagner supported the amendment. People need constitutional rights protected by addressing these facts up front so they don't come back over and over with new issues. He noted the federal

government had addressed this issue and a parallel was needed in state statute.

Rep. Curtiss **MOVED A SUBSTITUTE MOTION** to clear this up. She pointed out the 7th line from the bottom to say "the district court shall review the agencies findings..." ***{Tape : 1; Side : B; Approx. Time Counter : 39.3 - 42.5}*** Rep. Story said once this change was made in the last sentence it was probably not relevant. The "only" is the important word in that sentence where the district court will only review what is in the administrative record. He said it was his understanding that once you got through the circular process of review, the court had a complete record. They used what was in the record to make the administrative decision. The amendment would keep the court on track in reviewing what happened in the administrative process not creating a whole new process.

Rep. Eggers said he thought this was trying to stop litigious people who are raising frivolous issues and keep the case rolling and open so it does not run up the expense of the courts and the personnel of the administration. The language in the original section said "a court may not set aside an agencies decision unless it finds there is clear and convincing evidence that a decision was arbitrary or capricious or not in compliance with law". He pointed out the court is going to do that anyhow, since that is the standard that is used to determine that the case is closed. The court won't allow the case to remain open because there is a phrase called "judicial economy" and if people just keep raising issues that are frivolous, most of those issues will be reviewed and resolved by the re-review process by sending it back to the agency. Once that is done, the district court will review the agency's findings to determine whether they are supported by substantial and credible evidence. ***{Tape : 1; Side : B; Approx. Time Counter : 44.4}***

The question was called on the substitute motion. The motion **PASSED** 17-3 with Reps. Dale, Wagner and Hurdle voting no.

Rep. Hurdle pointed out the objections by the Land Board members, there hadn't been that many court cases and MEPA has been significant. She was concerned about exemptions from MEPA. Harley Harris from the Attorney General's Office said the concern was with section 2. The concern focuses on the exemption of certain department functions from MEPA compliance.

Rep. Story said it was his understanding that the board would not have to invoke MEPA on a few minor things, but they could do it if they want.

Rep. Mood noted the trustees of the Land Board's opposition and felt it was bizarre that they would testify against a bill that would make it easier to manage the trust to do what it was set up for, and that is to generate money for the schools of the state. He read an article from the *U.S. News and World Report* published March 30, 1997, where John Leo discussed the explosion of litigation in this country. ***{Tape : 1; Side : B; Approx. Time Counter : 52}***

Rep. Erickson pointed out that citizens have a say and departments should make wise decisions. He said of all the cases, half the time the citizens were right. We should not be taking away citizen involvement.

Rep. Harper said MEPA was the bill that established the Environmental Quality Council and the bill that looks at the ramifications for the environment for all of the actions this state undertakes. The bill would put agencies ahead of citizens.

Rep. Wagner reminded the committee that the state was 50th in income and jobs nationwide. This bill was an opportunity to remedy some of that by speeding up the operations of timber sales, permitting mining, and so on. People have a right to object, bring those issues and concerns forward, up front and we will discuss them and deal with them and go on, but don't continue to come back and plug the system.

The question was called. The motion **PASSED** 12 to 8 on a roll call vote.

ADJOURNMENT

Adjournment: 5:10 P.M.

Bill Tash

REP. BILL TASH, Chairman

Deb Thompson

DEB THOMPSON, Secretary

BT/DT

7

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

EXHIBIT 7
DATE 2/3/99
HB 142

MARC RACICOT, GOVERNOR
1625 ELEVENTH AVENUE
STATE OF MONTANA
DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684
PO BOX 201601
HELENA, MONTANA 59620-1601

February 1, 1999

MEMORANDUM

TO: Bud Clinch, Director, DNRC
FR: Tommy Butler, Trust Lands Attorney THB
RE: Further review of MEPA Litigation in the past ten years

Representative Ron Erikson has requested that the Department give further information regarding the Department's litigation in which the Montana Environmental Policy Act, §§75-1-201, et seq., MCA, was asserted as a major legal issue between 1989 and 1999. The Department has prevailed in every case in which the District Court restricted the evidence considered by it to the administrative record. These cases are:

1. North Fork Preservation Ass'n v. DSL, 238 Mont. 451 (1989)
2. Friends of the Wild Swan v. DSL, No. DV-89-074(A) (11th Judic. Distr., 1991)
3. Red Thunder, Inc., IBLA No. 91-186, -220, -221 (1992)
4. Zortman Mining, Inc., IBLA No. 93-412, -413 (1992)
5. Mott v. DSL, No. CDV-93-1731 (1st Judic. Distr., 1994)
6. Friends of the Wild Swan v. DSL, No. CDV-95-314 (1st Judic. Distr., 1995)
7. In Re MTM-84978 (Bitter Creek) IBLA (1996)

Where the District Court allowed the environmental Plaintiffs to submit evidence outside the administrative record, the Department did not prevail. The Department did not prevail in the following cases:

1. Friends of the Wild Swan v. DSL, No. DV-89-073(B) (11th Judic. Distr., 1991)
2. Gold Creek Res. Prot. Ass'n v. DSL, No. 76549 (4th Judic. Distr., 1992)
3. Friends of the Wild Swan v. DSL, No. DV-93-361(b) (11th Judic. Distr., 1993)
4. Ravalli Co. F&G Ass'n v. DSL, 273 Mont. 371 (1995)
5. Skyline Sportsmen v. State Land Bd., 951 P.2d 29 (1997)
6. Friends of the Wild Swan v. DNRC, No. CDV-9700558 (1998)

Two cases remain in litigation. In Little Snowies Coalition v. DNRC, ADV-9900010 (1st Judic. Distr. Ct., 1999) no decision has been made on extra- administrative record evidence. The Department prevailed in Friends of the Wild Swan v. Babbitt & DNRC, CV 96-172 (Mt. Fed. Distr. Ct., 1998) at the District Court level because it was restricted to the administrative record developed by a federal administrative agency. This case is currently on appeal.

7

EXHIBIT 8
DATE 2/3/99
HB 142

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

TRUST LAND MANAGEMENT DIVISION

MARC RACICOT, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

January 28, 1999

MEMORANDUM

TO: Chairman Bill Tash and Members of the House Natural Resources Committee

FROM: Department of Natural Resources and Conservation

RE: House Bill 142 Information

The House Natural Resources Committee requested several items of information from the DNRC during the hearing on HB 142 held Monday, January 25, 1999. This memo provides the responses to the Committee's requests.

1. **Representative Joan Hurdle** requested a listing of pending environmental reviews by the DNRC.

At any given time the DNRC is in the process of preparing several environmental reviews on proposed actions. These reviews range from categorical exclusion documents, to checklist environmental assessments, to environmental assessments (EA) of various magnitudes, to full-blown environmental impact statements (EIS). The majority of these reviews in progress at the current time are regarding minor actions and it is unlikely there will be litigation regarding these reviews and actions. However, there are some proposed actions currently under review that are of a larger scale and may be litigated. These actions include:

a. Beaver Lake Collaborative (near Whitefish)
b. Cyclone/Coal Timber Harvest Project (North Fork of the Flathead River area)
c. South Fork Lost Creek Timber Sale (Swan State Forest)
d. Sour Fish Timber Sale (near Clearwater)
e. Tongue River Railroad easements
f. Crow Boundary Settlement exchanges

2. **Representative David Ewer** requested how many environmental reviews have been conducted by the DNRC over the past ten years.

Over the past three years the Trust Land Management Division (TLMD) has averaged over 300 environmental reviews per year. Expanding this average over ten years would lead us to believe that over 3,000 reviews have been conducted over the past ten years by the TLMD. The actual numbers of EA's may vary from year to year, but the time required to complete all levels of review has steadily increased.

3. **Representative Ewer** also asked how many cases regarding environmental reviews by the DNRC have been litigated over the past ten years.

The following major MEPA cases were litigated by the Department (DNRC and the former Department of State Lands (DSL) between 1989 and 1999.

1. North Fork Preservation Ass'n v. DSL, 238 Mont. 451 (1989)
2. Friends of the Wild Swan v. DSL, No. DV-89-074(A) (11th Judic. Distr., 1991)
3. Friends of the Wild Swan v. DSL, No. DV-89-073(B) (11th Judic. Distr., 1991)
4. Gold Creek Res. Prot. Ass'n v. DSL, No. 76549 (4th Judic. Distr., 1992)
5. Red Thunder, Inc., IBLA No. 91-186, -220, -221 (1992)
6. Zortman Mining, Inc., IBLA No. 93-412, -413 (1992)
7. Friends of the Wild Swan v. DSL, No. DV-93-361(b) (11th Judic. Distr., 1993)
8. Mott v. DSL, No. CDV-93-1731 (1st Judic. Distr., 1994)
9. Friends of the Wild Swan v. DSL, No. CDV-95-314 (1st Judic. Distr., 1995)
10. Ravalli Co. F&G Ass'n v. DSL, 273 Mont. 371 (1995)
11. In Re MTM-84978 (Bitter Creek) IBLA (1996)
12. Skyline Sportsmen v. State Land Bd., 951 P.2d 29 (1997)
13. Friends of the Wild Swan v. Babbitt & DNRC, CV 96-172 (Mt. Fed. Distr. Ct., 1998)
14. Little Snowies Coalition v. DNRC, ADV-9900010 (1st Judic. Distr. Ct., 1999)

DNRC legal counsel estimates that approximately 9 out of the 14 cases required the Department to respond to additional testimony raised by the Plaintiffs after the administrative record was closed. Friends of the Wild Swan v. DSL, Cause No. DV-93-361 (1st Judic. Distr., 1995), there was purely a programmatic challenge. Three other cases were before the Interior Board of Land Appeals, which adheres strongly to the principle that cases are to be reviewed on the administrative record only. The remaining case was Friends of the Wild Swan v. Babbitt & DNRC, CV 96-172 (Mt. Fed. Distr. Ct., 1998) in which the administrative record formed the evidentiary basis for the case. All our other MEPA cases in Montana courts involved additional evidence developed by the Plaintiffs after the close of the administrative record.

4. **Representative Aubyn Curtiss** requested how many FTE's and $ are expended on environmental reviews.

The TLMD does not have any positions that are dedicated full-time to MEPA compliance. However, essentially every employee performs some MEPA compliance activities as part of their respective positions. The TLMD conducted a very cursory inventory of its four bureaus and six field offices regarding time and dollars expended on MEPA compliance. What follows is brief summary of that inventory:

a. TLMD FY budget includes 122.86 FTE and $7 million.
b. Estimate that 32.89 FTE, $1.27 million is expended on MEPA compliance.
c. 26.8% of FTE time is expended on MEPA compliance.
d. 17.9% of total appropriated $ is expended on MEPA compliance.
e. 28% of the appropriated personal service $ is expended on MEPA compliance.

EXHIBIT 9
DATE 2/3/99
HB 142

Amendments to House Bill No. 142
1st Reading Copy

For the House Natural Resources Committee

Prepared by Kathleen Williams
February 3, 1999

1. Page 3, line 14.
Following: "decision."
Insert: "Where new, material, and significant evidence is presented to the district court which had not previously been presented to the agency for its consideration, the district court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its factual findings and administrative decision before the district court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency, ~~or~~ considered by the ~~district~~ court. The district court shall ~~not hold any evidentiary hearings or make any original findings of fact, but shall only~~ review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review."

- END -

HOUSE OF REPRESENTATIVE
ROLL CALL

NATURAL RESOURCES COMMITTEE

DATE 2-3-99

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bill Tash, Chairman	✓		
Rep. Hal Harper, Vice Chair	✓		
Rep. Cindy Younkin, Vice Chair	✓		
Rep. Rod Bitney	✓		
Rep. Aubyn Curtiss	✓		
Rep. Rick Dale	✓		
Rep. Bill Eggers	✓		
Rep. Ron Erickson	✓		
Rep. David Ewer	✓		
Rep. Gail Gutsche	✓		
Rep. Joan Hurdle	✓		
Rep. Dan McGee	✓		
Rep. Douglas Mood	✓		
Rep. Karl Ohs	✓		
Rep. Scott Orr	✓		
Rep. Bob Raney			✓
Rep. Bob Story	✓		
Rep. Jay Stovall	✓		
Rep. Carley Tuss	✓		
Rep. Doug Wagner	✓		

HOUSE STANDING COMMITTEE REPORT

February 4, 1999

Mr. Speaker:

We, your committee on **Natural Resources** report that **House Bill 142** (first reading copy -- white) **do pass as amended.**

Signed: Bill Tash
Representative Bill Tash, Chair

And, that such amendments read:

1. Page 3, line 10.
Following: "(3)"
Insert: "(a)"

2. Page 3, line 12.
Following: "decision."
Strike: "In"
Insert: "Except as provided in subsection (3)(b), in"

3. Page 3, line 16.
Following: "law."
Insert: "(b) When new, material, and significant evidence is presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review."

- END -

Committee Vote:
Yes 12, No 8.

280959SC.ham

10:06
3-4

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

NATURAL RESOURCES SUBCOMMITTEE

DATE 2-3-99 BILL NO. HB142 NUMBER

MOTION: McGee Move HB142 AS Amended

PASS

NAME	AYE 12	NO 8
Rep. Cindy Younkin, Vice Chr	✓	
Rep. Karl Ohs	✓	
Rep. David Ewer		✓
Rep. Rod Bitney	✓	
Rep. Carley Tuss		✓
Rep. Aubyn A. Curtiss	✓	
Rep. Gail Gutsche		✓
Rep. Dan McGee	✓	
Rep. Bob Raney		✓
Rep. Bob Story	✓	
Rep. Doug Mood	✓	
Rep. Rick Dale	✓	
Rep. Doug Wagner	✓	
Rep. Joan Hurdle		✓
Rep. Scott Orr	✓	
Rep. Ron Erickson		✓
Rep. Jay Stovall	✓	
Rep. Bill Eggers		✓
Rep. Hal Harper, Vice Chr.		✓
Rep. Bill Tash, Chr.	✓	

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

NATURAL RESOURCES SUBCOMMITTEE

DATE 2-3-99 BILL NO. HB 142 NUMBER

MOTION: Curtiss moved Amendment

Kathleen 3-3 Substitute Am 17-3 pass

NAME	AYE	NO
Rep. Cindy Younkin, Vice Chr		
Rep. Karl Ohs		
Rep. David Ewer		
Rep. Rod Bitney		
Rep. Carley Tuss		
Rep. Aubyn A. Curtiss		
Rep. Gail Gutsche		
Rep. Dan McGee		
Rep. Bob Raney		
Rep. Bob Story		
Rep. Doug Mood		
Rep. Rick Dale		
Rep. Doug Wagner		
Rep. Joan Hurdle		
Rep. Scott Orr		
Rep. Ron Erickson		
Rep. Jay Stovall		
Rep. Bill Eggers		
Rep. Hal Harper, Vice Chr.		
Rep. Bill Tash, Chr.		

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

NATURAL RESOURCES SUBCOMMITTEE

DATE 2/3/99 BILL NO. HB142 NUMBER

MOTION: Rep Curtiss move Do Pass

NAME	AYE	NO
Rep. Cindy Younkin, Vice Chr		
Rep. Karl Ohs		
Rep. David Ewer		
Rep. Rod Bitney		
Rep. Carley Tuss		
Rep. Aubyn A. Curtiss		
Rep. Gail Gutsche		
Rep. Dan McGee		
Rep. Bob Raney		
Rep. Bob Story		
Rep. Doug Mood		
Rep. Rick Dale		
Rep. Doug Wagner		
Rep. Joan Hurdle		
Rep. Scott Orr		
Rep. Ron Erickson		
Rep. Jay Stovall		
Rep. Bill Eggers		
Rep. Hal Harper, Vice Chr.		
Rep. Bill Tash, Chr.		

HB 298 - 2/3/99

Bob Raney

- Table -
Aye

333 - Aye

300 - Aye

142 - No
Hands - yes

LEGISLATIVE TAPE LOG

COMMITTEE: Tape 1 Side A Natural Resources (1)

DATE: 2-3-99

MINUTES	CONTENT NOTES
	Hearing on HB 723
	Sponsor, Rep. Cliff Trexler
	Pro: Dennis Applebury, Exhibit 1
13.6-18.5	Opp: Mike Cavaleri Ravalli County Planning Board, Exhibit 2
22	Robert Rasmussen L. C County Planner
	Jane Jelinsky, Mt Assoc. Counties
	Lee Arbuckle Mt. League of Women Voters, Exhibit 3
	Janet Ellis, Mt Audubon, Exhibit 4
34.2	Linda Stoll Mt. Assoc. of Planners Exhibit 5
	Ann Hedges Mt. Environmental Information Center
	Marga Lincoln, AERO, Exhibit 6
39.2	Dustin Deane, Mt. Wildlife Federation

LEGISLATIVE TAPE LOG

COMMITTEE: Joint Natural Resources (2)
DATE: Side A 2-3-99

MINUTES	CONTENT NOTES
	Greetings: Reps. McGee
	Closing by Sponsor: Rep. Ivy closed the Hearing on HB423
	Executive Action on HB 298 Rep. Young moved Do PASS
55.1	Discussion: Reps Ewan, Bitney, Hurdle
	Rep Hurdle moved to Table HB 298 Motion passed 12-7
Joint Side B	
	Executive Action HB331 Rep. Curtiss moved Do PASS Motion passed 9-1 with Rep.
	Wagner voting no.
	Executive Action on HB 300. Rep. Ogan moved Do PASS Motion passed with Reps. Young,
	McGee, Orr & Wagner voting no
	Executive Action on HB 142 Rep. Curtiss moved Do Pass

LEGISLATIVE TAPE LOG

COMMITTEE: Joint Natural Resources (3)
DATE: Side B 2-3-99

MINUTES	CONTENT NOTES
17.7	Exhibits 7 & 8
21.9	Discussion: Reps. Ivan, Curtiss
	Rep. Curtiss moved the Amendment Exhibit 9
	Discussion: Reps. Yourkin, Sanders, Mood, Eggers, Story, Wagner
393-425	Rep. Curtiss moved a Substitute motion
444	Discussion: Reps. Story, Eggers
	Motion on the Substitute motion Carried with Reps. Dale, Wagner, & Handle voting no
52	Discussion: Reps. Handle, Story, Mood, Sanders, Eggers, Wagner
	Motion: Do Pass as Amended - Rep McKee HB 142 Carried 12-8

HB 113 SPONSOR: Younkin, Cindy SHORT TITLE: Revise hazardous waste act
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 02/01/1999 HEARD ON: 03/05/1999
EXECUTIVE ACTION: 03/08/1999 Bill Concurred as Amended -- VOTE: 10 - 0
FINAL DISPOSITION 04/23/1999 Chapter Number Assigned

HB 120 SPONSOR: Brown, Roy SHORT TITLE: Revise reclamation & development grant fund use
BY REQUEST OF: Department Of Natural Resources And Conservation
REFERRED ON: 02/01/1999 HEARD ON: 03/03/1999
EXECUTIVE ACTION: 03/04/1999 Bill Concurred -- VOTE: 9 - 0
FINAL DISPOSITION 03/16/1999 Chapter Number Assigned

HB 142 SPONSOR: Anderson, Shiell SHORT TITLE: Clarify environmental review for state proposals
BY REQUEST OF: Department Of Natural Resources And Conservation
REFERRED ON: 02/10/1999 HEARD ON: 03/03/1999
EXECUTIVE ACTION: 03/11/1999 Bill Concurred -- VOTE: 6 - 5
FINAL DISPOSITION 04/06/1999 Chapter Number Assigned

HB 158 SPONSOR: Ohs, Karl SHORT TITLE: Revise storage tank inspection and closure law
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 04/06/1999 HEARD ON: 04/07/1999
EXECUTIVE ACTION: 04/08/1999 Bill Concurred as Amended -- VOTE: 8 - 2
FINAL DISPOSITION 04/29/1999 Chapter Number Assigned

HB 183 SPONSOR: Dale, Rick SHORT TITLE: Generally revise opencut mining act & metal mine reclamation laws
BY REQUEST OF: Department Of Environmental Quality
REFERRED ON: 02/23/1999 HEARD ON: 03/15/1999
EXECUTIVE ACTION: 03/27/1999 Bill Concurred as Amended -- VOTE: 11 - 0
FINAL DISPOSITION 04/29/1999 Chapter Number Assigned

HB 248 SPONSOR: Harrington, Dan SHORT TITLE: Use of municipal water or sewer utility is not a beneficial use
REFERRED ON: 02/22/1999
FINAL DISPOSITION 04/14/1999 (S) 2nd Reading Indefinitely Postponed; Vote: 47 - 2

MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN WILLIAM CRISMORE**, on March 3, 1999 at 3:00 P.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. William Crismore, Chairman (R)
Sen. Dale Mahlum, Vice Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Mack Cole (R)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Glenn Roush (D)
Sen. Mike Taylor (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Larry Mitchell, Legislative Branch
Jyl Scheel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 120, 3/03/1999; HB 95, 3/03/1999; HB 142, 3/03/1999
Executive Action: HB 95; HB 120

HEARING ON SB 120

Sponsor: **SENATOR TOM KEATING, SD 5, BILLINGS presented the bill for REPRESENTATIVE ROY BROWN, HD 14, BILLINGS**

Closing by Sponsor:

REPRESENTATIVE ROBERT STORY, HD 24, PARK CITY, stated he closed.

EXECUTIVE ACTION ON HB 95

Motion: **SEN. KEATING** moved that **HB 95 BE CONCURRED IN.**

Motion/Vote: **SEN. MCCARTHY** moved that **HB 95 AMENDMENTS BE ADOPTED. Motion carried 8-0.**

Motion/Vote: **SEN. KEATING** moved that **HB 95 BE CONCURRED IN AS AMENDED. Motion carried 8-0. SEN. GROSFIELD** will carry bill on Senate floor.

{Tape : 1; Side : A; Approx. Time Counter : 10.1 - 20.3; Comments : None.}

HEARING ON HB 142

Sponsor: **REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON**

Proponents:

Bud Clinch, Director, Department of Natural Resources and Conservation
John Bloomquist, Montana Stockgrowers Association
Don Allen, Western Environmental Trade Association
Lorna Karn, Montana Farm Bureau
Cary Hegreberg, Montana Wood Products Association
Patrick Heffernan, Montana Logging Association
Gail Abercrombie, Executive Director, Montana Petroleum Assoc.

Opponents:

Ira Holt, Ravalli County Fish & Wildlife Association
Tony Schoonen, State Lands Coalition and Skyline Sportsmen Assoc.
George Darrow, Oil Geologist, Former State Senator and Landowner in the Flathead
Harley Harris, Assistant Attorney General representing Attorney General Joe Mazurek as member of the State Board of Land Commissioners,
Rusty Harper, Representing State Auditor Mark O'Keefe as member of the State Board of Land Commissioners

Joe Kerwin, Deputy Secretary of State representing Secretary of State Mike Cooney as member of the State Board of Land Commissioners
Joe Lamson, Representing Nancy Keenan, Office of Public Instruction
Beth Cading, Bozeman
Julia Page, Northern Plains Resource Council
Tary Mockabee, Friends of the Wild Swan
Richard Parks, President of Bear Creek Council
Van Jamison, Montana Wildlife Federation
Bill Holdorf, Skyline Sportsman Association
Betty Waddell, Montana Association of Churches
Anne Hedges, Montana Environmental Information Center
Janet Ellis, Montana Audubon Society
Lorey Thomas, Anaconda Sportsman Club
Denise Roth Barber, Montana Sierra Club

Opening Statement by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON, presented **HB 142** which basically clarifies what is required of agencies in the Department of State Lands. It is brought about in the wake of a case where the court said "when there is a substantial question as to whether the change of use may have a significant effect upon the human environment, an **Environmental Impact Statement** would be required." That leaves a very confusing message and not much guidance as to when an **EIS** would be required on such things as lease renewals for state lands. It was also pointed out by **Justice Gray** in that same decision that **EIS** decisions are generally required under the administrative rules of Montana "for major state actions significantly affecting the quality of the human environment".

He presented an overview of the House Amendment added in Section 1 (3)(B) which says the administrative agency has the opportunity to have all the evidence that is significant in making its decision. This would not allow the agency to be blind sided by waiting until their review was done and then come into the District Court level with new evidence that would make the agency look like they had done an inadequate job. This gives them the opportunity to have all the evidence to put into the equation. The New Section 2 basically says if you simply have a lease renewal or transfer of lease, the terms of the lease do not change nor do the conditions. That is not a new event that would trigger the **Montana Environmental Protection Act (MEPA).**

Proponents' Testimony:

Bud Clinch, Director, Department of Natural Resources and Conservation, stated **HB 142** is brought forth to help the Department better fulfill their responsibilities associated with managing 5.2 million acres of land and to fulfill their responsibilities to the beneficiaries of revenue generation. **House Bill 142** is an attempt to stem the tide of expansion of **MEPA.** He passed out **EXHIBIT(4)** and **EXHIBIT(5)** to illustrate his talk about litigation, expansion of **MEPA** and actions making their ability to carry out their traditional activities very difficult. He then went through the bill to explain the changes and additions. The Department is not trying to do a wholesale exemption of **MEPA.** He feels they have an incredible past performance with **MEPA** as evidenced by the amount of budget and FTE that has been dedicated to that in the past as well as recognition received from various entities as well. He encouraged the committee's support of the bill.

{Tape : 1; Side : A; Approx. Time Counter : 20.3 - 40; Comments : None}

John Bloomquist, Montana Stockgrowers Association, pointed out to the committee **MEPA** is a procedural law not a substantive law. **House Bill 142** codifies some of the principals particularly established in the Federal Court interpretation of the **National Environmental Protection Act (NEPA).** Case law under **NEPA** is generally influential in interpreting **MEPA. HB 142** is not going to gut **MEPA** nor is it going to prevent public input or prevent anyone from litigating a case under **MEPA.** He urged the committee's support.

Don Allen, Western Environmental Trade Association, spoke in support of the bill. The amendment, added in the House regarding evidence, is an important addition to the bill and clears up some misunderstandings that were raised in the House hearing. It is no one's intention to weaken the opportunity for people to participate in the **MEPA** process. The handout provided by **Mr. Clinch** regarding the number of law suits speak volumes about the need for this bill. He encouraged a DO PASS consideration.

Lorna Karn, Montana Farm Bureau, stated this legislation makes a lot of sense for the reasons outlined by the former proponents. She urged the committee's support.

Cary Hegreberg, Montana Wood Products Association, said **MEPA** has been described as a look before you leap statute. It is a procedural statute. **MEPA** was not designed to strangle economic

activity by forcing such exhaustive analysis that agencies and people just give up trying. He hopes the committee will ponder and inquire about the original intent of **MEPA** and whether this bill fosters or detracts from that original intent. He approved the House amendment regarding evidence. He encouraged the committee's support.

Patrick Heffernan, Montana Logging Association, spoke in support of the bill as per **EXHIBIT(6)**.

Gail Abercrombie, Executive Director, Montana Petroleum Association, spoke in support of **HB 142** and the side boards it puts on these decisions which gives a more focused direction for the decisions the Department has to make. It makes it more streamlined, more efficient, and more clear.

Opponents' Testimony:

Ira Holt, Ravalli County Fish & Wildlife Association, spoke in opposition to **HB 142**. The cause of their lawsuit, Sheep v. Sheep, was inaction. In 1991, it came to the Association's attention a new landowner had moved into the southern part of the Bitterroot Valley taking ownership of a ranch that also had some grazing leases on State Land. Domestic sheep were brought onto the lease. Some members of the Association knew there was recent scientific evidence that if domestic sheep came into contact with wild Bighorn Sheep, the Bighorn Sheep died. In 1991, **Mr. Holt** wrote a letter to **Chuck Wright, Department of State Lands in Missoula**, stating their concern in this matter. **Mr. Wright** called him after receiving the letter and stated this could be a problem. He was to do some checking into the matter and call back but they never heard from him again. They started contact with the **DSL** office in Helena to try to reach some agreement on this situation. Over the next two years there was not much action and **DSL** finally said they were not required to do it but they would do an Environmental Assessment (EA). Based on that EA, a decision was to be made on what to do. The **DSL** Director, at that time, published his decision the day he left office. They were in contact with the new director for the next few months. This decision was not appealable and it became obvious it would not be reviewed. They determined their only course of action was to go to court. They went to court and lost in District Court and went on to the Supreme Court. They did present new evidence partially because some of these scientific studies were ongoing. They did not mean it to be new evidence to blind side the agency, they meant it as supporting evidence to support the view there was a problem.

The Supreme Court decision stated the **DSL** did error. Something happened on the ground that said there might be environmental impact and something should be done. Because the lessee was no longer grazing domestic sheep the **DSL** said again they did not want to do anything. The Association asked they write some rules so this same thing did not happen in the future. Finally, after seven years, some rules were adopted in 1998. In their opinion, this bill now says the Department wants to have the right not to do anything if they don't think they need to do something. The Association thinks a better way to clarify the Supreme Court decision, in their case, is to write the rules to say it does not make any difference if a decision has just been made or not, if something happens on the ground that is different than what has been happening for last 80 years, and there is evidence brought which says there is a problem, then **MEPA** is triggered and something should be done. He requested the bill be killed.

Tony Schoonen, State Lands Coalition and Skyline Sportsmen Association, spoke in opposition to the bill as per **EXHIBIT(7)** and **EXHIBIT(8)**.

George Darrow, Oil Geologist, Former State Senator and Landowner in the Flathead, spoke in opposition to **HB 142** as per **EXHIBIT(9)** and **EXHIBIT(10)**.

{Tape : 1; Side : B; Approx. Time Counter : 0 - 34; Comments : None.}

Harley Harris, Assistant Attorney General representing Attorney General Joe Mazurek as member of the State Board of Land Commissioners, spoke in opposition to the bill as per **EXHIBIT(11)**.

Rusty Harper, Representing State Auditor Mark O'Keefe as member of the State Board of Land Commissioners, stated Mr. O'Keefe supports the Attorney General's amendments. If the committee adopted the amendments he would support the bill.

Joe Kerwin, Deputy Secretary of State representing Secretary of State Mike Cooney as member of the State Board of Land Commissioners, spoke in opposition to the bill stating Secretary Cooney has long tried to get the public involved. He believes this bill goes too far for many of the reasons stated by **Mr. Harris** previously. He does not think there has been a case that proves this bill is needed. **MEPA** works and continues to work.

Joe Lamson, Representing Superintendent Nancy Keenan, Office of Public Instruction, spoke in opposition to the bill. Sheep v.

Sheep was not a frivolous thing, it was a very substantive danger to the state Bighorn Sheep population which the State of Montana had put considerable resources into developing over the years. In their trust responsibilities, they not only have to look at being prudent land managers and how they manage their land, but how those actions affect the neighbors within that area.

Beth Cading, Bozeman, stated she had been a **National Environmental Protection Act** Planning Compliance Officer for six years for the National Park Service in Yellowstone. **MEPA,** like **NEPA,** provides statutory foundation for guidance in making decisions where environmental values are in conflict with other values. These acts are not designed to eliminate environmental damage from projects but instead they insure an agency decision maker takes environmental factors into account when evaluating the consequences of a project. **MEPA** and **NEPA** are the processes that allow the public to participate in agency decisions. **HB 142** is an over reaction. She also disagreed that, in some cases, state school trust lands should be exempt from environmental review. She urged the committee to kill this bill for the future of Montana.

Julia Page, Northern Plains Resource Council, spoke in opposition to the bill as per **EXHIBIT(12).**

Tary Mockabee, Friends of the Wild Swan, spoke in opposition to the bill and stated she had been involved in the past year on a state land timber sale in her neighborhood. Her community cared very much about what changes this sale would incur. They helped shape the outcome by working with DNRC. This was the democratic process at work. She would like to think public involvement is still welcomed and honored in America.

Richard Parks, President of Bear Creek Council, spoke in opposition of the bill as per **EXHIBIT(13).**

Van Jamison, Montana Wildlife Federation, spoke in opposition to **HB 142.** In all the time he has been involved in **MEPA** he has never seen citizens ambushing agencies be a problem. When agencies get into problems, it is invariably because they have ignored citizens. The lawsuits filed come from agencies that simply do not listen and do not respond. They then become unhappy when citizens take them to Court to try to make them do what they are supposed to do. He suggests Sections 1 and 3 of the bill are nothing more than a shield for state government employees against citizens with legitimate issues. He requested a DO NOT PASS recommendation from the committee unless it would be amended with the Attorney General's amendments.

Bill Holdorf, Skyline Sportsman Association, spoke in opposition to the bill. He referred to **Mr. Bloomquist's** testimony where he stated there was about five areas that would not be affected. If they are not being affected, the bill is not needed.

Betty Waddell, Montana Association of Churches, spoke in opposition to the bill as per **EXHIBIT(14)**.

Anne Hedges, Montana Environmental Information Center, spoke in opposition to the bill and stated most of their concerns had already been addressed. She passed out a handout, **EXHIBIT(15),** which shows all the agencies that have to comply with **MEPA.** One agency out of eight is asking that you change **MEPA** for everyone. It also shows the cases **DNRC** has won and lost. The **MEPA** cases they have won they claim they won because the court has restricted evidence. Why don't citizens have the right to say the Department ignored them and bring in evidence which supports that.

Janet Ellis, Montana Audubon Society, spoke in opposition to the bill as per **EXHIBIT(16)**.

Lorey Thomas, Anaconda Sportsman Club, stated he liked to be last to make a good impression on the committee. Do Not Pass **HB 142.**

Denise Roth Barber, Montana Sierra Club, spoke in opposition to **HB 142.** She stated in any sports activity, you would never have your best offense wait until the last quarter or inning and say because we have these great offensive moves, let's surprise the opposing team and play them at the end. What if you lost? She resents the implication that they wait in the bushes and surprise people at the end because they do not.

Questions from Committee Members and Responses:

SENATOR COCCHIARELLA questioned if **REP. ANDERSON** knew **George Darrow** and he indicated he did. She then stated he is the author of the **MEPA** act. The Environmental Quality Council gives a **George Darrow** award every year to someone who implements **MEPA.** The Darrow award was recently given to the Forestry Division of DNRC. She asked if he had considered bringing this issue before **EQC** for study? **REP. ANDERSON** said this legislation was presented to him just prior to the session and he was not certain the **EQC** had met at that time. The legislation is sound in principle.

SENATOR COCCHIARELLA wondered if this bill had been brought before **EQC** for consideration? **Mr. Clinch** stated they responded to **EQC** in September with a list of all the Department's

legislation that was prepared. He presented a 30 minute discussion at the December meeting regarding this bill. **SEN. COCCHIARELLA** stated they appreciated that. Would the Department and sponsor consider allowing **EQC** to address this topic through some resolution or statutory study that says **EQC** needs to look at this again? **Mr. Clinch** stated he would not be supportive or willing to withdraw this legislation with the understanding the **EQC** would do a study.

SENATOR GROSFIELD questioned if ag leases are five years? **Mr. Clinch** stated the standard ag and grazing leases are ten years and they review between 800-1100 of them annually.

SENATOR GROSFIELD asked if it was the intention that every lease renewal ought to go through **MEPA** review? **Mr. Jamison** said no, not unless something has changed in the interim and that something has the potential to create significant impacts. **SEN. GROSFIELD** asked what if something comes up in year four on a ten year lease? What is fair in that regard given there is a contract in place? **Mr. Jamison** said the agency would be bound to honor its contractual agreement unless honoring that agreement would cause them in some way to violate the law. **SEN. GROSFIELD** stated he presumed contracts had verbiage regarding compliance with the law. **Mr. Clinch** stated that was correct and all lessees are required to abide by all applicable laws.

SENATOR GROSFIELD asked if he was advocating a mid-term **MEPA** evaluation? **Mr. Jamison** stated he did not think there should be a mid-term evaluation. He thinks **MEPA** takes a look at actions of state government and once you have acted, then you honor your contractual obligation.

SENATOR GROSFIELD asked the same question of **Mr. Harris** for his interpretation. **Mr. Harris** stated he did not think it would be a breach of contract on the part of the Department if four or five years down the road they went to the lessee and said they had evidence that the method of grazing being used is causing some harm and under the multiple use mandate the practices need to be modified. The amendments are trying to address this situation. They also propose to put some very strict timelines in place. If a citizen thinks there is a problem, they would have had an obligation, under the amendments in the sheep case, to come forward with their concern in 30 days and file suit in 90 days otherwise the Department then knows it is in compliance and nothing happens.

{Tape : 2; Side : A; Approx. Time Counter : 0 - 42; Comments : None.}

SENATOR GROSFIELD stated under the terms of a lease, can the Department come in and comment? **Tom Butler, Trust Lands Attorney for DNRC**, stated the Sheep v. Sheep case changed the way **MEPA** was administered. Previously the Department believed **MEPA** was triggered by a state action. Prior to the Sheep v. Sheep case the Department tried to work with the lessee if there was a problem. If there was a violation of law, the only mechanism they could use would be lease cancellation. In the Sheep v. Sheep case there was no violation of law, there was no substantive statute that forced any action. The litigants in that case believed that no sheep grazing should occur on state land and in response brought their case to District Court.

This case has definitely changed the way the Department is doing business. Now they are subject to invalidating any lease in mid-term and essentially violating the lease contract between the Department and the lessee. People take these leases in good faith and 97% are fine people and do a good job out on the land. They can still cancel these people for substantive violations of the law but what is most troublesome to them is the concept of passive **MEPA** where the Department is not active in anyway. Through the Supreme Court decision **MEPA** has been transformed into reviewing the actions of third parties under previously authorized contracts.

SENATOR TAYLOR questioned if the bill was challenged in its present state, what would the challenge be? Is the bill Constitutional? **Mr. Harris** stated this was a hard question to answer. There is a school of thought out there that says any action by the legislature that might erode on the ability of the public and people to protect that would be a challenge vote.

SEN. TAYLOR asked if he had reviewed the Attorney General's amendments? **Mr. Clinch** stated yes and that he disagreed with them. **SEN. TAYLOR** said if this bill were to pass, would it reduce the cost of doing business? **Mr. Clinch** stated if the bill were to pass certainly the cost associated with litigation would be reduced.

SENATOR GROSFIELD stated did the legislature, at the time of adoption, think **MEPA** would end up being such a significant portion of state natural resource agencies with 27% of the FTE's in the lands department being devoted just to **MEPA** compliance? **Mr. Darrow** stated he did not have any knowledge of current state budget or DNRC or DEQ budgets. He would observe that the **MEPA** process is sometimes elaborated on to the extent that **MEPA**, instead of being a straight forward effort to understand and define the consequences of an environmental action becomes a programmatic ritual of filling in the blanks of developing

appendices and data of an item. From a public viewpoint, this sometimes ends up doing more to obscure the impact statement than it does to explain and clarify them. He is surprised that the number is that high.

SENATOR GROSFIELD stated in some of cases, **MEPA** seems to border on being used substantively, especially in the situation where new information is being brought in after the fact. Do you see that as a problem? **Mr. Darrow** stated **MEPA** is basically a requirement that state agency people make a best efforts attempt to determine the truth and outline the consequences of their actions. Over the years it has become a ritual of filling in the blanks which requires a lot of manpower. The real thought applied to achieving the purposes of **MEPA** sometimes don't seem to come to the top.

SENATOR CRISMORE questioned how much money had been tied up in the timber sale on the Swan and why was it in litigation the last time? **Mr. Clinch** said he was not sure he could give an accurate dollar amount on the Mid-Soup Timber Sale. Litigation started in 1993. In 1994 they withdrew the timber sale and agreed they would go forth and do an EIS. Over the course of two years they redrafted the complete timber sale and included several mitigations brought forth by the plaintiffs. They took that through the public process and ultimately to the Land Board where they offered approval. The timber sale was offered again and they were litigated a second time by the same plaintiffs. This time in Court, the Plaintiffs brought up some of the same issues with new evidence that the Department had not totally mitigated all their concerns. A new issue brought up this time was, this sale now had been reduced in volume so much and such an exorbitant about of money had been spent doing the analysis, it was now a "below cost sale" which violated their trust mandate because they were not making any money on this sale. Currently the sale has been enjoined from further harvest. The time lines were about to expire when harvest began just before Christmas. Within about nine days the Court issued an injunction. The injunction hearing was held last week and the Judge refused the Department's request to remove the logs that have been harvested and which remain on site. The Judge further refused their request to implement an injunction bond. They have lost four times now on this sale. **SEN. CRISMORE** said everytime the Department had lost, they went back to Court and thought it was in place, with the agreement of the Land Board? **Mr. Clinch** stated each time they have gone back they have brought on a new, higher level of experts. Each time they ultimately had to take back the proposal to the Land Board. Like the Department, the Land Board believed an adequate analysis had been done and they had a defensible position.

SENATOR GROSFIELD stated it seems a bit much to go through lawsuit after lawsuit with the Land Board agreeing each time to finally get down to the argument that too much money has been spent because of all these lawsuits. That is not what **MEPA** is all about, that is not what environmental analysis is about and it certainly is not what good government is about. Do the Attorney General's amendments help with this situation? If not, what can be done to deal with this? **Mr. Harris** stated he did not have the intimate knowledge of this timber sale that the Director does. In general, it seems to be excessive. The argument raised in the fourth round about now so much time has been spent it is below cost seems to be a little far fetched. You can get into a situation where the Court says one thing and the Legislature does not like it, you either have to micro manage against every conceivable theory out there or at a certain point you have to trust the Court sooner or later to get it right. The Department is concerned that in some cases they have still not gotten it right and that is why they are here today. The amendments to the evidence portion, simply suggested they do what is done in any other administrative procedure act context and if there is new evidence send it back to the agency. The current bill, as amended in the House, does that.

Closing by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON, stated he did not feel the opponents had addressed the crux of what this bill does and instead used their standard anti-MEPA bill arguments. The bill was born with the Sheep v. Sheep case. The Department addressed the problem as it saw was adequate. There was some dispute between **Mr. Holt** and his group that it was not adequate so they went to Court. The question of whether or not what the Department did was adequate in that case was not addressed. To get to the point where the Court could say in their decision, they had to do an EIS, they took this meandering route through a number of very loosely related federal case law to get to the point. In their wake, they left a total lack of guidance to state agencies attempting to comply with the critically important **MEPA** and to State Courts attempting to insure such compliance. This bill is a reasonable approach in trying to clarify what the agency is responsible for under the terms of **MEPA**. There is nothing in the bill that precludes good judgement on doing an environmental assessment or environmental impact statement.

{Tape : 2; Side : B; Approx. Time Counter : 0 - 19; Comments : None.}

ADJOURNMENT

Adjournment: 5:40 P.M.

Wm S Crismore
SEN. WILLIAM CRISMORE, Chairman

Jyl Scheel
JYL SCHEEL, Secretary

WC/JS

Montana
The Independent Record

STATE NATURAL RESOURCES
EXHIBIT NO. 4
DATE 3-3-99
BILL NO. HB 142
Bud

Sportsmen sue state over timber sale

By PERRY BACKUS
Lee News Network

DILLON – Butte's Skyline Sportsmen filed suit Thursday to challenge the state's decision to harvest timber near an elk winter range south of Dillon.

The suit, filed in Helena district court, asks the court to require the Department of Natural Resources and Conservation and the state Board of Land Commissioners to revisit their decision to sell about 5 million board feet of timber in the West/Middle Fork Blacktail Creek timber sale.

Controversy erupted over the timber sale because of its proximity to two Montana Department of Fish, Wildlife and Parks' wildlife game ranges – the Blacktail Wildlife Management Area and the Robb-Ledford Wildlife Management Area.

Sportsmen contend the DNRC didn't consider alternatives that would have limited impacts to the game ranges.

Following an unanimous decision by the Board of Land Commissioners in July to adopt the DNRC recommendations for the sale, RY Timber of Townsend purchased the timber last fall.

So far the sale hasn't been harvested, said Stan Vlahovich, manager of the DNRC Dillon District. Under the timber contract, RY Timber has five years to harvest the trees, Vlahovich said.

Vlahovich said he hadn't seen a copy of the lawsuit. A representative of RY Timber didn't return a phone call from The Montana Standard Thursday.

The sportsmen's lawsuit contends the DNRC failed to consider cumulative impacts of previous sales to old growth timber when it designed the current sale. It said the State Forest Land Management Plan – a 1996 document that outlines the DNRC's land management philosophy – calls for maintaining old growth timber at a minimum of 50 percent of historic levels.

When the DNRC developed the West/Middle Fork Blacktail Creek timber sale, it neglected to mention that 66 acres of old growth timber were harvested in the project area in 1988, according to the suit.

Those 66 acres added to the estimated 78 acres of old growth that would be harvested under the current proposal will push old growth harvest levels to nearly 69 percent in the project area, the suit said.

The state also discovered that there was more timber volume than what it had initially anticipated, according to the suit.

Initial estimates said the sale would provide 3 million board feet of timber for harvest. After actual tree marking was completed, the state discovered the volume would be closer to 5.1 million board feet, according to the suit.

The suit said the state rejected a "winter range" alternative because its estimated 1.7 million board feet of timber reduced potential for income to the state trust.

If a similar increase in volume could be yielded under the winter range alternative, which reduced the impact on elk habitat, the sportsmen estimated that about 2.9 million board feet could be harvested. That is close to the 3 million board feet originally sought by the DNRC, they said.

"We want the DNRC to go back to the land board with all the information," said Brian Morris, attorney for the Skyline Sportsmen Association. "Our argument is there is new, substantial information that needs to be considered."

Tom Bugni of Skyline Sportsmen said his group is worried about the future of the large elk herd in the area. If elk lose the security of the small patches of timber that dot the landscape of the lower Blacktail area, Bugni said the herd could suffer.

Perry Backus is a reporter for the (Butte) Montana Standard.

C.M. Russell Museum director resigns

GREAT FALLS (AP) — The executive director of the C.M. Russell Museum, Lorne Render, has resigned to accept a similar job in Kansas.

Render, who has headed the museum staff since 1991, is leaving his post April 30 to become director of the Marianna Kistler Beach Museum of Art on the Kansas State University campus in Manhattan, Kan.

He will be the Beach museum's first permanent director, and said he looks forward to the challenge of shaping a new museum.

His departure will follow the annual Russell Art Auction, scheduled in March.

John Stephenson, president of the Russell board of directors, said Render "will be sorely missed." The board's executive committee is meeting to begin a search for a successor.

Study: Bitterroot River flowing clean

HAMILTON (AP) —

Judge upholds allegations against Shelby mayor

SHELBY (AP) — A district judge has upheld allegations by the state that Shelby Mayor Larry Bonderud filed false Medicaid claims in his optometry practice.

Barbara Hoffmann, staff attorney for the state, said the Department of Public Health and Human Services will impose a one-year suspension, and Bonderud's Medicaid patients will have to see another optometrist during that time.

He also will be subject to special claims reviews after he is allowed to rejoin the Medicaid program.

some patients were new to his office that he had treated before.

As a result, Bonderud received $11,058 more than he was entitled to get from Medicaid over a four-year period. Under Medicaid guidelines, compensation to doctors is higher for treating new patients and making repairs than for treating established patients and replacing eyeglasses.

Bonderud, who has offices in Browning, Conrad and Shelby, repaid the money in 1990, but has continued to fight the state's disciplinary measures

like to make a single mistake, but mistakes are made and they're honest mistakes," he said.

Hoffmann, disagreed, saying the department gave Bonderud plenty of chances to correct his billing procedure. But she said he had a "pattern of incorrect billing even after he had been warned."

"The distinguishing feature of his case was that over a period of time he had failed to correct billing errors. Even before he was sanctioned, the records show that we sent, at our own expense, a med-

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

TRUST LAND MANAGEMENT DIVISION

MARC RACICOT, GOVERNOR

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PO BOX 201601
HELENA, MONTANA 59620-1601

January 28, 1999

MEMORANDUM

TO: Chairman Bill Tash and Members of the House Natural Resources Committee

FROM: Department of Natural Resources and Conservation

RE: House Bill 142 Information

The House Natural Resources Committee requested several items of information from the DNRC during the hearing on HB 142 held Monday, January 25, 1999. This memo provides the responses to the Committee's requests.

1. **Representative Joan Hurdle** requested a listing of pending environmental reviews by the DNRC.

At any given time the DNRC is in the process of preparing several environmental reviews on proposed actions. These reviews range from categorical exclusion documents, to checklist environmental assessments, to environmental assessments (EA) of various magnitudes, to full-blown environmental impact statements (EIS). The majority of these reviews in progress at the current time are regarding minor actions and it is unlikely there will be litigation regarding these reviews and actions. However, there are some proposed actions currently under review that are of a larger scale and may be litigated. These actions include:

a. Beaver Lake Collaborative (near Whitefish)
b. Cyclone/Coal Timber Harvest Project (North Fork of the Flathead River area)
c. South Fork Lost Creek Timber Sale (Swan State Forest)
d. Sour Fish Timber Sale (near Clearwater)
e. Tongue River Railroad easements
f. Crow Boundary Settlement exchanges

2. **Representative David Ewer** requested how many environmental reviews have been conducted by the DNRC over the past ten years.

Over the past three years the Trust Land Management Division (TLMD) has averaged over 300 environmental reviews per year. Expanding this average over ten years would lead us to believe that over 3,000 reviews have been conducted over the past ten years by the TLMD. The actual numbers of EA's may vary from year to year, but the time required to complete all levels of review has steadily increased.

3. **Representative Ewer** also asked how many cases regarding environmental reviews by the DNRC have been litigated over the past ten years.

The following major MEPA cases were litigated by the Department (DNRC and the former Department of State Lands (DSL) between 1989 and 1999.

1. North Fork Preservation Ass'n v. DSL, 238 Mont. 451 (1989)
2. Friends of the Wild Swan v. DSL, No. DV-89-074(A) (11th Judic. Distr., 1991)
3. Friends of the Wild Swan v. DSL, No. DV-89-073(B) (11th Judic. Distr., 1991)
4. Gold Creek Res. Prot. Ass'n v. DSL, No. 76549 (4th Judic. Distr., 1992)
5. Red Thunder, Inc., IBLA No. 91-186, -220, -221 (1992)
6. Zortman Mining, Inc., IBLA No. 93-412, -413 (1992)
7. Friends of the Wild Swan v. DSL, No. DV-93-361(b) (11th Judic. Distr., 1993)
8. Mott v. DSL, No. CDV-93-1731 (1st Judic. Distr., 1994)
9. Friends of the Wild Swan v. DSL, No. CDV-95-314 (1st Judic. Distr., 1995)
10. Ravalli Co. F&G Ass'n v. DSL, 273 Mont. 371 (1995)
11. In Re MTM-84978 (Bitter Creek) IBLA (1996)
12. Skyline Sportsmen v. State Land Bd., 951 P.2d 29 (1997)
13. Friends of the Wild Swan v. Babbitt & DNRC, CV 96-172 (Mt. Fed. Distr. Ct., 1998)
14. Little Snowies Coalition v. DNRC, ADV-9900010 (1st Judic. Distr. Ct., 1999)

DNRC legal counsel estimates that approximately 9 out of the 14 cases required the Department to respond to additional testimony raised by the Plaintiffs after the administrative record was closed. Friends of the Wild Swan v. DSL, Cause No. DV-93-361 (1st Judic. Distr., 1995), there was purely a programmatic challenge. Three other cases were before the Interior Board of Land Appeals, which adheres strongly to the principle that cases are to be reviewed on the administrative record only. The remaining case was Friends of the Wild Swan v. Babbitt & DNRC, CV 96-172 (Mt. Fed. Distr. Ct., 1998) in which the administrative record formed the evidentiary basis for the case. All our other MEPA cases in Montana courts involved additional evidence developed by the Plaintiffs after the close of the administrative record.

4. **Representative Aubyn Curtiss** requested how many FTE's and $ are expended on environmental reviews.

The TLMD does not have any positions that are dedicated full-time to MEPA compliance. However, essentially every employee performs some MEPA compliance activities as part of their respective positions. The TLMD conducted a very cursory inventory of its four bureaus and six field offices regarding time and dollars expended on MEPA compliance. What follows is brief summary of that inventory:

a. TLMD FY budget includes 122.86 FTE and $7 million.
b. Estimate that 32.89 FTE, $1.27 million is expended on MEPA compliance.
c. 26.8% of FTE time is expended on MEPA compliance.
d. 17.9% of total appropriated $ is expended on MEPA compliance.
e. 28% of the appropriated personal service $ is expended on MEPA compliance.

Environmental Assessments Database Results

DATE	EAS	Total
1/1/96 - 12/31/96	343	343
1/1/97 - 12/31/97	276	276
1/1/98 - 12/31/98	210	210
Total	829	829

EA 3-year average (1996 - 1998) 276.33

EA = Environmental Assessment
CED=Environmental Assessment Exclusions

Calendar year 98	AGMB	FMB	MMB	SUMB		SUMB	
4th quarter		11	12	15	28	10	Reciprocal Access
3rd quarter		9	3	14	23	72	Easements
2nd quarter		5	16	5	18	90	New leases/licenses
1st quarter		12	13	12	19	172	
TOTAL		**37**	**44**	**46**	**88**		

Calendar year 97	AGMB	FMB	MMB	SUMB		SUMB	
4th quarter		9	11	10	34	8	Reciprocal Access
3rd quarter		7	6	13	27	64	Easements
2nd quarter		7	17	12	47	190	New leases/licenses
1st quarter		2	11	6	58	262	
TOTAL		**25**	**45**	**41**	**166**		

Calendar year 96	AGMB	FMB	MMB	SUMB		SUMB	
4th quarter		1	4	14	61	0	Reciprocal Access
3rd quarter		10	7	15	43	121	Easements
2nd quarter		8	20	13	61	137	New leases/licenses
1st quarter		10	10	9	58	258	
TOTAL		**29**	**41**	**51**	**223**		

MEPA COMPLIANCE ISSUE **DATE: 1/27/99**

Estimate Current Year Costs - Annual Basis

BUREAUS					**TOTAL MEPA FTE**	**FTE COST**
AG & GRAZING	**% Time**	**Personal Services**	**FTE Cost**	**TOTAL**		
K. Chappell	0.05	$52,334	$2,617	$2,617		
D. Mousel	0.20	$40,386	$8,077	$8,077		
T. Hughes	0.25	$42,342	$10,586	$10,586		
P. Rennie	0.90	$37,690	$33,921	$33,921		
Total FTE	1.40	$172,752	$55,200	$55,200	**1.40**	**$55,200**
MINERALS						
M. Mason	0.15	$49,394	$7,409	$7,409		
T.Kinley	0.35	$35,555	$12,444	$12,444		
	0.50	$84,949	$19,853	$19,853	**0.50**	**$19,853**
FOREST MGMT						
	12 Positions = 4.4 FTE			$207,500	**4.40**	**$207,500**
SPECIAL USES						
C. Rooney	0.05	$45,143	$2,257	$2,257		
M. Norris	0.10	$42,564	$4,256	$4,256		
L. Axline	0.10	$33,079	$3,308	$3,308		
S. Frickel	0.05	$39,433	$1,972	$1,972		
J. Fairbanks	0.10	$45,120	$4,512	$4,512		
Total	**0.40**		$16,305	**$16,305**	**0.40**	**$16,305**
	5 Positions = .40 FTE					
AREA OFFICES						
SWLO	17 Positions = 6.23 FTE			246,999	**6.23**	**$246,999**
CLO	19 Positions = 3.7 FTE			157,883	**3.70**	**$157,883**
NWLO	46 Positions = 13.5 FTE			480,000	**13.50**	**$480,000**
SLO	1 Positions = .1FTE			3,000	**0.10**	**$3,000**
NELO	11 Positions = 2.46 FTE			76,155	**2.46**	**$76,155**
ELO	4 Positions .05 each = .20 FTE			8,378	**0.20**	**$8,378**
GRAND TOTAL					**32.89**	**$1,271,274**

	TLMD FTE	**MEPA FTE**	**Percent**	
FY99 Total FTE	122.86	32.89	26.77%	Of 122.86 FTE related to TLMD, 26.77% is spent on MEPA activities

TLMD FY99	
Ops. Budget	$7,291,700
Less Crow Lan	($100,000)
Exchange	$7,191,700

$1,271,274 of Personal Services dollars from a budget of $7,191,700 or 17.68% spent on MEPA activities.

TLMD Personal Services budget for FY 99 = $4,555,669

With regards to MEPA costs versus TLMD Personal Services budget **27.91%** of the TLMD Personal Services Budget is spent on MEPA activities

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a process and the right of agencies who must use EAs in decision-making to rely on them. It does so by essentially allowing the plaintiffs--who either sat out the EA process or whose views were not accepted during that process--to make a "new" record relating to matters addressed in the EA, after the fact and absent a legal challenge to the EA or the process by which the EA was developed. If the plaintiffs wanted to impact the EA, they were obliged to do so during that process. Since the evidence presented to the District Court was not offered during that process, it cannot properly be considered now in this indirect attack on the EA via a challenge to the Board's decision.

*37. Moreover, the plaintiffs could have presented the evidence at issue to the Board prior to the Board's conclusion that § 77-2-203(2), MCA, applied or during the public comment and input opportunities provided on the Board's special findings ratifying and approving the land exchange. They did not do that either. Thus, I cannot agree with the Court's determination that this evidence can now be used to create genuine issues of material fact regarding whether the Board's decision was arbitrary or capricious.

Finally, the Court's approach to the use of late-offered evidence to create genuine issues of material fact regarding whether the Board's decision was arbitrary or capricious essentially allows this Court--or any court--to intrude directly into the decision-making responsibilities of the Board. No matter how the Court couches it, its decision in this case means that every administrative agency decision can be challenged on "arbitrary or capricious" grounds if a mere evidentiary conflict in the record can be raised--or created after the fact--and every such challenge will allow courts to both intrude into agency decision-making and substitute their judgment for that of the agency. Notwithstanding the rumored discontent in many quarters over the extent to which the legislature has delegated authority to administrative agencies, I cannot agree that the Court can properly vest that authority in itself.

I dissent.

N* Sitting in place of Justice W. WILLIAM LEAPHART.

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SENATE NATURAL RESOURCES
EXHIBIT NO. 6
DATE 3-3-99
BILL NO. HB 142

MONTANA LOGGING ASSOCIATION

HB 142

Testimony of Patrick Heffernan, Staff Forester
Before the
Senate Natural Resources Committee
March 3, 1999

Mr. Chairman; members of the committee:

These comments regarding HB 142 are submitted on behalf of the Montana Logging Association, a trade association representing independent logging contractors in the State of Montana.

The Montana Logging Association (MLA) supports HB 142. MEPA was designed as a decision-making tool so that State Agencies could make better decisions regarding management projects and their effects on the natural and human environment. Unfortunately, MEPA has since become the basis for many frivolous appeals and lawsuits that seek to enjoin lawful and sound state management actions. In many cases, these litigated lawful actions are State Trust Land timber sales designed to produce sustained revenues for dedicated beneficiaries of State Trust Lands, while providing for public values.

It should be implicitly understood that State Trust Lands are not public lands per-se, they are lands designated to provide for the generation of revenue for their respective beneficiaries. While we understand and support the need for public input and involvement during the development of State Trust Land management actions, we are dismayed at the depth and breadth that current legal interpretations of MEPA statutes allow litigants to pursue. To allow the litigation of infinite, perceived, associated and cumulative project effects to continue is to invite the complete analysis-paralysis of State Trust Land management.

We respectfully request that you adopt HB 142, which will help to re-focus the original intent of NEPA, which is to make good management decisions.

Respectfully submitted,

P.O. Box 1716 • Kalispell, MT 59903 • (406) 752-3168 • Fax (406) 756-9574 • Email: mla@digisys.net

SENATE NATURAL RESOURCES
EXHIBIT NO. 7
DATE 3-3-99
BILL NO. HB142

THE MONTANA COALITION FOR APPROPRIATE MANAGEMENT OF STATE LAND
3210 OTTAWA
BUTTE MONTANA 59701

Chairman Crismore---Members of the committee:

For the record, my name is Tony Schoonen of Butte and I'm here representing the State Lands coalition and Skyline Sportsmen Asso.

Our organizations are totally opposed to H.B. 142. We feel that this bill is a "Get Even" bill which allows state agencies to "duck their responsibilities" and create a form of closed government. The tax payers of this state deserve much more.

How dare we even question the actions of personnel within the state lands division of DNRC, even tho the vast majority of their salaries and benefits come from taxes paid into the General Fund by average working families and retirees like myself? This figure may be 50% at this time, this committee should check this out.

When our groups found that these same people knowingly ignored the law by recommending to the state land board that they okay the Turner Land Exchange and the Blacktail timber sale, we had no other option than to go to court. We participated from day one by attending hearings with the state land board and commenting on the E.I.S. We even paid for an attorney to interpret the law prior to filing the law suit. In the case of the Blacktail timber sale we held three meetings and one all day field trip to the harvest site next to the Blacktail Game Range. We also hired two experts in forest management and elk security cover. These experts pointed out weaknesses in the sale unit next to the game range, but these recommendations were discounted by Mr Clinch and Tom Buttler at the land board meeting, so the sale was approved without taking any changes into consideration. We were forced to file a law suit because wildlife and recreation were the least of DNRC's concerns.

Our groups easily won our cases in the Supreme court on the Turner Land Exchange as did the Ravalli sportsmen in their case, which showed that we were correct in forcing DNRC to be honest with the land board. We are very fortunate to have one of the best land boards ever, but they rely on their administrators to supply them with legal recommendations before they make their decision on a multitude of issues.

This bill will make it much more difficult to allow a checks and balance by working people over the actions of our government agencies, and promotes taxation without participation and repersentation.

We recommend a "NO" vote on HB 142. This is regressive legislation.

and a relatively higher density of the competitive brook trout. DFWP had no management plan in place for developing the westslope cutthroat trout population in Robb Creek, and none was proposed at the time of the hearing.

Additionally, at the hearing before the District Court, the Plaintiffs' witnesses raised valid questions about the extent to which access to Cherry Creek and Spanish Creek would be available to the public under the stream access law. All of the above factual issues must be viewed against the backdrop of a Board which maintained during its decisionmaking process that § 77-2-203(2), MCA, did not apply to this proposed exchange, but when faced with this lawsuit abruptly changed its position and belatedly adopted findings relating to significant public use of the waters involved.

We conclude that Plaintiffs should be accorded an opportunity through full discovery to explore the factual basis, or lack thereof, for the Board's finding that Robb Creek and Ledford Creek constitute bodies of water with significant public use values. The Plaintiffs have raised genuine issues of material fact as to whether Robb Creek and Ledford Creek are streams with significant public use value, including: whether a "potential to" provide significant public use value is equivalent to providing significant public use value; the weight, if any, to be accorded an increase in stream mileage under state ownership as a result of the land exchange; the significance of the Robb Creek westslope cutthroat trout population in light of the other facts and circumstances; and the truth of the claim in the EA that Ledford Creek can provide a good sport fishery to the public. Because of these issues of fact, we hold that a material issue of fact exists as to whether the Board's decision approving the proposed land exchange was arbitrary, capricious, and unlawful. Summary judgment was therefore improper.

Having determined that the District Court erred in granting summary judgment for the Board, we need not reach the other issues raised on appeal. We vacate the summary judgment and remand to District Court for further proceedings consistent with this Opinion.

JUSTICES HUNT, NELSON, REGNIER and TRIEWEILER concur.

HONORABLE BUYSKE, District Judge, specially concurring.

I concur in the result of the majority opinion, but not in all that is stated in that opinion. I believe the path the majority chose to take to that result runs too broadly through a factual analysis and invites

future litigants to view district court proceedings as a means to do what should have been done at the administrative agency level—develop the record. I would hold the District Court erred as a matter of law in concluding, in effect, the decision of the Board of Land Commissioners approving the land exchange at issue here was not arbitrary.

Although the matter was put before the District Court via a motion for summary judgment, the District Court chose to consider and rule on the matter as a judicial review of the administrative decision of the Board. The District Court could not make factual findings as those would be beyond the purview of that proceeding, hence its decision to uphold the decision of the Board is one of law. This Court's review of legal decisions is plenary as no exercise of discretion is necessary to those decisions—the legal conclusion is either correct or not. *Hicklin v. CSC Logic, Inc.* (1997), [283 Mont. 298], 940 P.2d 447, 449; *Erickson v. State ex rel. Bd. of Medical Examiners* (1997), [282 Mont. 367], 938 P.2d 625, 628. When conducting its plenary review of a district court's review of an informal administrative decision, this Court follows the same standard as the district court, namely, does the record before the administrative body establish it acted arbitrarily, capriciously, or unlawfully. *North Fork Pres. v. Department of State Lands* (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867. The administrative decision is arbitrary and capricious if it was not based upon a consideration of all relevant factors and if there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971), 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136, 153.

The authority of the Board of Land Commissioners is established by the Montana Constitution:

> The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.

Article X, Section 4, Mont. Const.

Section 77-1-202(1), MCA, echoes the constitutional authority of the Board when it states:

> The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of

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those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

A further "regulation" or "restriction" provided by law with respect to the actions of the Board is enumerated in § 77-2-203(2), MCA:

> If the requirements of subsection (1) and 77-2-204 are met, state lands bordering on navigable lakes and streams or other bodies of water with significant public use value may be exchanged for private land if the private land borders on similar navigable lakes, streams, or other bodies of water.

The record before the District Court and this Court makes clear the Board did not believe the requirements of § 77-2-203(2), MCA, applied to this proposed land exchange transaction. Obviously, § 77-2-203(2), MCA, *does* apply to this land exchange transaction, and the conclusion of the Board to the contrary is a clear error of legal judgment. This error necessarily affected the development and consideration of the record upon which the Board based its April 15, 1996, decision to approve the exchange. The Board could not have considered the elements of § 77-2-203(2), MCA, when its decision was made as the Board did not understand § 77-2-203(2), MCA, to apply to the proposed transaction.

Applying the review standards noted above to this situation, I hope I restate the obvious when clarifying that an administrative board must consider relevant factors prior to reaching its decision and not after that decision has been made. In this case it is undisputed that the Board approved the land exchange *and then* considered the similarity of the significant public use values of the waterways in question. The supplementary adoption of relevant evidence, when that evidence is statutorily required for lawful decision making, is unacceptable.

The Board is entrusted by the public with fiduciary control over Montana's public trust land. To disregard a statute governing the maintenance of that trust in reaching a decision affecting the trust corpus, and then to provide after-the-fact-of-the-decision findings to justify compliance with the previously disregarded statute, is a not insignificant breach of the Board's obligation to the public. Regardless of the manner in which the supplementary findings were adopted or the validity of facts supplemented to the record, the process is of such unseemly appearance as to be arbitrary as a matter of law. The statute ignored by the Board in making the decision to approve this land exchange is a direction from the citizens of this State that certain factors need be considered, and certain assurances confirmed, with respect to the exchange of their public trust lands for private lands. The citizens of this State can demand nothing more, and expect nothing less, than to have the governmental entities of the State follow the valid directions of the governed.

The Board has a statutory obligation to make certain, when it trades public lands that contain navigable lakes and streams or other bodies of water with significant public use value, the State of Montana receives lands with similar bodies of water. The Board's refusal to consider § 77-2-203(2), MCA, during its decision making process and its attempt to justify its decision to approve the land exchange with supplementary hearings regarding § 77-2-203(2), MCA, constitutes an arbitrary failure of this statutory obligation.

I would remand this matter to the District Court for its return to the Board of Land Commissioners with instructions to reconsider its decision regarding this land exchange and to properly hear and consider evidence as to the significant public use values of the bodies of water upon the lands to be exchanged.

JUSTICE GRAY, dissenting.

I respectfully and reluctantly dissent from the Court's opinion. While it is clear that the Board of Land Commissioners and its legal advisers did not cover themselves in glory via their conduct in these proceedings, I cannot join the Court's sweeping effort to reconstitute the administrative record on which the Board made its decision in order to provide the plaintiffs a "second bite at the apple" in their late effort to impact on that record and the ultimate decision in this case. I would affirm the District Court's conclusion that the Board's decision was not arbitrary, capricious or unlawful.

The issue of whether the Board's decision was unlawful is not a difficult one. Late or not, the Board ultimately concluded that § 77-2-203(2), MCA, applies to this land exchange. When it did so, it made special findings relating to the statutory requirements on the basis of the record before it, provided opportunities for public input and comment on those findings, and ratified its earlier approval of the land exchange on the basis of those findings. Thus, it cannot fairly be said that the Board's decision was unlawful.

Moreover, while I agree with the Court and with Judge Buyske's thoughtful special concurrence that the procedures by which the Board's ratified decision was made were undoubtedly unseemly from the standpoint of the public's rightful expectations of the Board, the question before us is not whether the *procedures* were arbitrary or capricious. The question is whether the Board's *decision* was arbitrary or capricious, and I submit that it was not. The District Court concluded, and I agree, that sections 3.2.8 and 4.1.8 of the EA provided a sufficient basis—that is, substantial evidence—to support the Board's findings and conclusions that the land exchange meets the requirements of § 77-2-203(2), MCA. Beyond that, we cannot properly go in this case.

The Court, however, approaches this case as if it were a direct challenge to the EA, notwithstanding that all parties agree it is not. In its sweeping consideration and evaluation of the evidence the plaintiffs submitted to the District Court after the EA was long completed, this Court essentially upends the EA process and the right of agencies who must use EAs in decision-making to rely on them. It does so by essentially allowing the plaintiffs—who either sat out the EA process or whose views were not accepted during that process—to make a "new" record relating to matters addressed in the EA, after the fact and absent a legal challenge to the EA or the process by which the EA was developed. If the plaintiffs wanted to impact the EA, they were obliged to do so during that process. Since the evidence presented to the District Court was not offered during that process, it cannot properly be considered now in this indirect attack on the EA via a challenge to the Board's decision.

Moreover, the plaintiffs could have presented the evidence at issue to the Board prior to the Board's conclusion that § 77-2-203(2), MCA, applied or during the public comment and input opportunities provided on the Board's special findings ratifying and approving the land exchange. They did not do that either. Thus, I cannot agree with the Court's determination that this evidence can now be used to create genuine issues of material fact regarding whether the Board's decision was arbitrary or capricious.

Finally, the Court's approach to the use of late-offered evidence to create genuine issues of material fact regarding whether the Board's decision was arbitrary or capricious essentially allows this Court—or any court—to intrude directly into the decision-making responsibilities of the Board. No matter how the Court couches it, its decision in this case means that every administrative agency decision can be challenged on "arbitrary or capricious" grounds if a mere evidentiary conflict in the record can be raised—or created after the fact—and every such challenge will allow courts to both intrude into agency decision-making and substitute their judgment for that of the agency. Notwithstanding the rumored discontent in many quarters over the extent to which the legislature has delegated authority to administrative agencies, I cannot agree that the Court can properly vest that authority in itself.

I dissent.

SENATE NATURAL RESOURCES
EXHIBIT NO. 9
DATE 3-3-99
BILL NO. HB142

Testimony of George Darrow before the Senate Committee on Natural Resources March 3, 1999

The basic thrust of both HB 142 and SB 413 is to single out Montana voters, your constituents, as the enemy and to declare war on them. The "bureaucrats," and I don't use that term in disparagement, but only because it is awkward to use the phrase "Montana State Agency Personnel" over and over, want to subvert MEPA as an arm of the Legislature.

It is inconvenient for them to have the public, your constituents, involved in any decision making, just as it is inconvenient to have the Legislature invade their turf for 90 days every two years. Oh, how they exult when you go home! These state employees, these "public servants" then can take back their decision making dominance of state government and continue to direct the daily lives of your constituents.

The bureaucrats in their cozy compounds then can make all the decisions until you come back. Without consulting you or the public they, in their superior wisdom, can order the action to be taken in each and every nook and cranny of Montana's far flung, diverse landscape. They believe that your constituents who live in each of these localities and have accumulated a lifetime of experience and intimate knowledge of their home environment should be barred from expressing their opinions and contributing that experience and intimate knowledge to the public decision process.

Every Senator in this committee listens to and is accountable to his constituents. But bureaucrats who are not accountable find it inconvenient to consult these citizens. What do they know? They are just Montana voters and taxpayers. The bureaucrats know best– they are certified experts and the fountainhead of all wisdom. Their authority to decide should be unquestioned and absolute.

Now, what is this MEPA that they are attacking? The Montana Environmental Policy Act of 1971 has been in effect for over a quarter of a century. In that time it has worked smoothly to serve the Legislature and the people of Montana profitably and effectively. It is not an environmental *protection* act specifying some rigid conduct and imposing fines for misdeeds. It is an arm of the Legislature setting forth Legislative policy conforming to the Montana Constitution and creating an Environmental Quality Council to provide continuing Legislative oversight of the state agencies in carrying out that Legislative policy and implementing the mandates of the Montana Constitution.

Stated simply, **MEPA requires state agencies to think**, to consider the otherwise unforeseen, unintended and unwanted consequences of significant agency actions. These actions are significant because they typically involve *irreversible* decisions. By means of environmental impact statements, each agency must consider the consequences, and clearly and concisely set forth how they reached their conclusions. They must then engage the public, your constituents, Montana voters, in a structured dialogue to arrive at the right decisions for Montana's long term future. This is what they find burdensome.

Thousands of improved state decisions have been made under MEPA in the past 10 years and no more than a handful of lawsuits have arisen in all that time–two lawsuits out of 2400 MEPA actions in 1998. The positive results of MEPA Impact Statements are in their *preventing* hasty, ill-considered and costly agency actions that might have foreclosed future opportunities or cost tens of millions of dollars to mitigate, restore, or repair. MEPA is not an impediment, instead it is a great economic benefit to Montana. Sometimes good management comes down to avoiding the screw-ups.

The bureaucrats backing HB 142 and supporting SB 413 consider this implementing process of MEPA to be an intolerable nuisance. They demand that they be insulated from any citizen interference in their untrammeled right to hand down judgments from their command posts in Helena. They seek to avoid any input or challenge from the hinterlands where the people who would be affected have their homes and livelihoods.

These two bills, by stripping citizen rights from MEPA, would also strip the Legislative oversight function exercised by the bipartisan Environmental Quality Council on your behalf. By accepting these bills, you would be abdicating Legislative powers to the bureaucrats. In effect HB 142 and SB 413 are an attack by the Executive branch on the separation of powers and the authority of the Legislature, just as they are a declaration of war on Montana citizens and an attempt to avoid the mandates of the Bill of Rights and Article IX of the Montana Constitution. Without MEPA, bureaucrats are accountable to no one.

George Darrow
PO Box 400
Bigfork, MT 59911
837-4400

SENATE NATURAL RESOURCES
EXHIBIT NO. 10
DATE 3-3-99
BILL NO. HB 142

THE CONSTITUTION OF THE STATE OF MONTANA

ARTICLE II

DECLARATION OF RIGHTS

Section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. *In enjoying these rights, all persons recognize corresponding responsibilities. (emphasis added)*

ARTICLE IX

ENVIRONMENT AND
NATURAL RESOURCES

Section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

ATTORNEY GENERAL
STATE OF MONTANA

SENATE NATURAL RESOURCES
EXHIBIT NO. 11
DATE 3-3-99
BILL NO. HB 142

Joseph P. Mazurek
Attorney General

Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

February 25, 1999

Mr. Arthur "Bud" Clinch, Director
Montana Department of Natural
Resources and Conservation
1625 Eleventh Avenue
Helena, MT 59620-1601

Re: House Bill 142

Dear Bud:

This letter and attachment is this Office's effort to follow-up on the discussion of House Bill 142 ("HB 142") at the January, 1999 State Board of Land Commissioners' meeting. At that meeting we believe that a general consensus was reached among all of the members of the Land Board around two points relative to HB 142: (1) that the existing language in the bill setting out different standards of review for agency MEPA decisions is inconsistent and confusing; and (2) that the Department's intent in proposing HB 142 was to codify and make more workable the Montana Supreme Court's decision in the Ravalli County Fish & Game Ass'n v. Mont. D.S.L., 903 P.2d 1362 (Mont. 1995).

Accordingly, we have prepared several proposed amendments to HB 142 to effectuate what we perceive to be the Land Board' consensus and to otherwise clean up HB 142. The first set deals with the judicial review/new evidence question and is intended to accomplish two things. The first is to delete the duplicative and confusing "substantial credible evidence" standard found at page 3, line 23 of the House Third Reading copy of HB 142. The second is more a matter of drafting philosophy. In large part the change sought to be effected in HB 142 is to bring judicial review proceedings under MEPA into conformance with practices under the Montana Administrative Procedures Act. In that regard we recommend that using the "new evidence" language from MEPA (Mont. Code Ann. § 2-4-703) is the most sure way to bring about that result.

The second set of amendments attempts to more accurately codify the Ravalli County Sportsmen decision. The first step in that direction is, as Governor Racicot suggested at the Land Board meeting, adding language to subparagraph (2) of Section 2 which would recognize the second aspect of the Court's holding, i.e. that where the Department had a statutory duty to act and specific knowledge of possible environmental harm, MEPA compliance was triggered. The

second part is in response to the Department's concern that this rule creates substantial uncertainty in the administration of its grazing lease program in particular. We propose new language be added to Section 2 which requires notice to the Department of any problem and would put a fairly strict time limitation on any suits that could be brought on the basis of the Ravalli County Sportsmen rule. As we've pointed out before, we believe that the circumstances where this type of MEPA compliance duty would arise are rare, and in proposing this language we believe that the disruption to the administrative process would be minimized.

In light of the fact that HB 142 is set for hearing in the Senate Natural Resources Committee on March 3, 1999, we concluded that the quickest way to move this matter forward is by way of this letter. Since a number of persons have expressed interest in our discussions, we have provided them copies of this letter and the attachment. If you concur with any of our proposals, please let Joe or me know as soon as possible so we can jointly approach Rep. Anderson about proposing them to the Senate Natural Resources Committee on March 3, 1999.

Sincerely,

HARLEY HARRIS
Assistant Attorney General
hrh/jd
Enc.
cc: Land Board members
Rep. Shiell Anderson
Rep. Doug Mood
Sen. William Crismore
Cary Hegreberg, MT Wood Products Ass'n
Pat Heffernan, MT Logging Ass'n
John Bloomquist, MT Stockgrowers Ass'n
Ann Hedges, MEIC
Janet Ellis, MT. Audubon Society
Erin Billings, Lee Newspapers
Bob Anez, Associated Press

Attorney General's Proposed Amendments to House Bill 142
(House Third Reading Copy, HB0142.02)

DRAFT of March 3, 1999

Page 3, line 12
Delete: "EXCEPT AS PROVIDED IN SUBSECTION (3)(b),"

Page 3, line 13
Delete: "or evidence"

Page 3, line 14
Delete: "for the agency's consideration prior to the agency's decision."

Page 3, line 14.
Following: "decision."
Insert: If application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and any modifications, new findings, or decision with the court.

Page 3, lines 17-23
Delete: all

Page 3, line 25
Following: "(1)"
Insert: "Except as provided in subsection (2), "

Page 3, line 27
Following: "is"
Insert: "engaged in rulemaking or"

Page 3, line 25
Delete: "Except for rulemaking and as provided in subsection (1), the department and the board are otherwise exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77, including but not limited to lease renewals."

Page 4, line 2

Following: "renewals."

Insert: Except where the department and board have a specific statutory duty to avoid environmental harm and specific knowledge that such harm may arise when the department or board do not act, the

Page 4, line 2

Delete: "The"

Page 4, line 5

Following: "action."

Insert: As a prerequisite to filing a judicial action seeking to challenge a failure by the department or the board to take a required action, the department or the board must first be given written notice of the inaction complained of, the statute upon which the request to act is based, and the factual circumstances giving rise to the alleged duty to act. The department or the board shall have 30 days to respond to any such notice. If the department or the board do not take the requested action, a judicial proceeding seeking to challenge the decision not to act must be brought within 90 days of the alleged inaction or failure to act by the department or the board.

s:\hrh\wpfiles\hb0142.02(A)

SENATE NATURAL RESOURCES
EXHIBIT NO. 12
DATE 3-3-99
BILL NO. HB142

TESTIMONY OF JULIA PAGE
NORTHERN PLAINS RESOURCE COUNCIL
IN OPPOSITION TO HB 142
SENATE NATURAL RESOURCES COMMITTEE

March 3, 1999

Mr. Chairman and members of the Committee,

My name is Julia Page and I own and operate a river outfitting business in Gardiner and Big Sky. I have traveled here today to speak in opposition to HB 142 on behalf of the Northern Plains Resource Council, of which I am the Past Chair.

In 1972, family farmers and ranchers formed Northern Plains to protect their property and their livelihood threatened by energy development. They believed, and we believe, that Montanans have a right, and a responsibility, to participate in the public policy decisions that affect their lives. Our democratic system of government is based on the idea of public participation and on a system of checks and balances. HB 142 goes right to the heart of those principles, and unduly restricts the ability of Montana citizens to participate in and challenge decisions of a state agency.

Northern Plains has been involved in MEPA and NEPA processes for the past 27 years. From the Colstrip plants to managing minerals under Makoshika State Park, our members have made good faith efforts to ensure that agencies consider the the full range of effects proposed projects will have on the environment and consider a full range of management alternatives. That is what MEPA requires. We think this is right and needs to be done.

Citizen participation is what is being abused here in HB 142. The provision exempting agency inaction from MEPA consideration and the provision limiting the information that can be part of a court challenge both drastically diminish the public's ability to participate and have meaningful access to the decision making process. MEPA enables full examination of impacts. It opens the decision-making process. It seeks information, truth, if you will. Disallowing new information in a court challenge runs contrary to the intent of MEPA for full disclosure and balanced decision-making based on fact. Making these wrongful provisions retroactive to pending cases is even worse. Changing the rules in the middle of the game has never been fair.

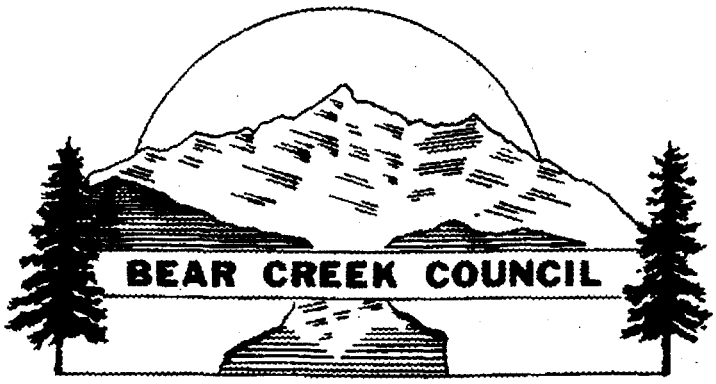
We are justifiably proud of the tradition of open government in Montana. MEPA has been an essential element of openness. HB 142 abuses that tradition. There is no need for this bill. It should be tabled, now.

Thank you for your time.

Julia Page, Northern Plains Resource Council

Julia Page

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 3-3-99
BILL NO. HB142



March 3, 1999

P. O. Box 448 — Gardiner, Montana 59030

TESTIMONY OF RICHARD PARKS IN OPPOSITION TO HB 142
SENATE NATURAL RESOURCES COMMITTEE

Mr. Chairman and members of the Committee,

My name is Richard Parks and I am the President of Bear Creek Council in Gardiner, Montana. BCC is a grassroots organization of citizens in the Upper Yellowstone Valley. Since 1983 our organization has had a successful working relationship with the Mineral Hill Mine, and we have participated in several MEPA processes, such as those revolving around the Church Universal and Triumphant developments.

We rise in opposition to HB 142 for many reasons. First, this is a solution in search of a problem. As you have already heard, hundreds of MEPA processes occur each year in Montana and the vast majority come to completion without advancing to court. By and large, Montana has a good law which mirrors the National Environmental Policy Act, a federal law which is in effect in every state in the nation.

I do not see the need to change our Environmental Policy Act so that it differs from the national one. Courts already severely limit the scope of challenges to environmental impact statements. There is no problem, and no need for this bill.

I am concerned that passing this bill sends a message to citizens that their participation in environmental decision making is neither anticipated nor desired. The Legislature has already removed the administrative appeal provisions that used to be in MEPA, which allowed citizens and applicants to avoid going to court if they were agrieved by a decision. I believe that the effect of this bill will be to increase the polarization and contentiousness of the permitting process. To the proponents I say, be careful what you wish for.

We also believe that DNRC and the Land Board should not be exempt from MEPA for their actions on state lands. Actions on state lands can have significant environmental consequences. If there are specific, ministerial actions which should be exempt from MEPA, then the DNRC can create a categorical exclusion through the rulemaking process.

We do not feel this bill should be amended. It cannot be made better. There is no need for it, and we encourage you to table it.

Thank you for your time. Richard C. Parks, President

Printed on Recycled Paper

SENATE NATURAL RESOURCES
EXHIBIT NO. 14
DATE 3-3-99
BILL NO. HB 142

"Celebrating Our Unity In Christ"

MAC
Montana Association of Churches
FOUNDED IN 1973

ANDREW SQUARE, SUITE G
100 - 24TH STREET WEST
BILLINGS, MONTANA 59102

MARGARET E. MACDONALD
EXECUTIVE DIRECTOR

TELEPHONE (406) 656-9779
FAX (406) 656-2156
E-MAIL: Zmac@wtp.net

March 3, 1999

Dear Senate Natural Resources:

Re: House Bill 142

The Montana Association of Churches urges you to reject House Bill 142. Land is a sacred trust given by God from the past for the present and the future. Environmental impact statements need to be accessible to the public. The public has a responsibility to inform the governmental agencies when creation is in danger. We need to work together.

HB142 decreases departmental activities in safeguarding Montana lands and it interferes with the responsibility of the public to report possible damaging policies on state lands. The department needs to continue to monitor and evaluate all leases.

There is going to be more pressure on state lands for alternate use with new crops and activities in the future. We need more public input going to the department to safeguard state lands, not less.

Technology exists and can be developed which enables industries to protect and enhance the air, land and water and be productive. Companies doing business in Montana can eliminate environmental harms by seeking alternative processes and products. When this is done, leases can readily be obtained.

All people are called by God to be responsible in our creativity and in protecting and sustaining that part of creation placed in our care.

Sincerely,

Betty Waddell

Betty Waddell, Coordinator
MAC Christian Advocates Network

WORKING TOGETHER:

American Baptist Churches of the Northwest

Christian Church (Disciples of Christ) in Montana

Episcopal Church Diocese of Montana

Evangelical Lutheran Churches in America Montana Synod

Presbyterian Church (USA) Glacier Presbytery

Presbyterian Church (USA) Yellowstone Presbytery

Roman Catholic Diocese of Great Falls - Billings

Roman Catholic Diocese of Helena

United Church of Christ Mt. - N. Wyo. Conference

United Methodist Church Yellowstone Conference

Recycled Paper

SENATE NATURAL RESOURCE
EXHIBIT NO. 15
DATE 3-3-99
BILL NO. HB142

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

MARC RACICOT, GOVERNOR
1625 ELEVENTH AVENUE
STATE OF MONTANA
DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684
PO BOX 201601
HELENA, MONTANA 59620-1601

February 1, 1999

MEMORANDUM

TO: Bud Clinch, Director, DNRC
FR: Tommy Butler, Trust Lands Attorney THB
RE: Further review of MEPA Litigation in the past ten years

Representative Ron Erikson has requested that the Department give further information regarding the Department's litigation in which the Montana Environmental Policy Act, §§75-1-201, et seq., MCA, was asserted as a major legal issue between 1989 and 1999. The Department has prevailed in every case in which the District Court restricted the evidence considered by it to the administrative record. These cases are:

1. North Fork Preservation Ass'n v. DSL, 238 Mont. 451 (1989)
2. Friends of the Wild Swan v. DSL, No. DV-89-074(A) (11th Judic. Distr., 1991)
NEPA 3. ~~Red Thunder, Inc., IBLA No. 91-186, -220, -221 (1992)~~
NEPA 4. ~~Zortman Mining, Inc., IBLA No. 93-412, -413 (1992)~~
5. Mott v. DSL, No. CDV-93-1731 (1st Judic. Distr., 1994)
6. Friends of the Wild Swan v. DSL, No. CDV-95-314 (1st Judic. Distr., 1995)
NEPA 7. ~~In Re MTM 84978 (Bitter Creek) IBLA (1996)~~

Where the District Court allowed the environmental Plaintiffs to submit evidence outside the administrative record, the Department did not prevail. The Department did not prevail in the following cases:

1. Friends of the Wild Swan v. DSL, No. DV-89-073(B) (11th Judic. Distr., 1991)
2. Gold Creek Res. Prot. Ass'n v. DSL, No. 76549 (4th Judic. Distr., 1992)
3. Friends of the Wild Swan v. DSL, No. DV-93-361(b) (11th Judic. Distr., 1993)
4. Ravalli Co. F&G Ass'n v. DSL, 273 Mont. 371 (1995)
5. Skyline Sportsmen v. State Land Bd., 951 P.2d 29 (1997)
6. Friends of the Wild Swan v. DNRC, No. CDV-9700558 (1998)

Two cases remain in litigation. In Little Snowies Coalition v. DNRC, ADV-9900010 (1st Judic. Distr. Ct., 1999) no decision has been made on extra- administrative record evidence. The Department prevailed in Friends of the Wild Swan v. Babbitt & DNRC, CV 96-172 (Mt. Fed. Distr. Ct., 1998) at the District Court level because it was restricted to the administrative record developed by a federal administrative agency. This case is currently on appeal.

MEPA Decisions by Agency, 1989 - 1998

	MDFWP	MDHES	MDEQ	MDNRC	MDSL	MDOA	MDOC	MDOH	MDOT	MDOL	TOTAL
1989											
EA/PER	3	93		2	25			39	1		163
EIS/DEIS/FEIS		1		2		2					5
CAT. EXCL					1			27			28
OTHER (FONSI,Checklist, etc.)		1									1
1990											
EA/PER	7	99		210				13			329
EIS/DEIS/FEIS				1							1
CAT. EXCL								19			19
OTHER (FONSI,Checklist, etc.)		2			39			2			43
1991											
EA/PER	10	160		147	59			10	1		387
EIS/DEIS/FEIS				2	4	1		2			9
CAT. EXCL		1						53	7		61
OTHER (FONSI,Checklist, etc.)		1			1			8	2		12
1992											
EA/PER	49	211		222	139				5	2	628
EIS/DEIS/FEIS		2		3	5	2			3		15
CAT. EXCL									33		33
OTHER (FONSI,Checklist,	11	3		1	189		1	1	15		221
1993											
EA/PER	91	271		67	86	3	1		16		535
EIS/DEIS/FEIS	2	1			3				1		7
CAT. EXCL		3							75		78
OTHER (FONSI,Checklist,	137	17			350				3		507
1994											
EA/PER	1	316		255	20		1		7		600
EIS/DEIS/FEIS		1		2	1						4
CAT. EXCL		3					1	1	86		91
OTHER (FONSI,Checklist, etc.)		1,097		1	411		15		2		1,526
1995											
EA/PER	93	195		236	10				5	1	540
EIS/DEIS/FEIS	2			1	3				1		7
CAT. EXCL	1	5							120		126
OTHER (FONSI,Checklist,	139	629		157	235	28	4		6		1,198
1996											
EA/PER	170	2	451	414					7		1,044
EIS/DEIS/FEIS	3		4	8					2		17
CAT. EXCL	7		1						122		130
OTHER (FONSI,Checklist,	81		1,475	289					1		1,846
1997											
EA/PER	170		301	460		1			14		946
EIS/DEIS/FEIS	2		2	6					1		11
CAT. EXCL			2						108		110
OTHER (FONSI,Checklist,	33		1,441	259					2		1,735
1998											
EA/PER	125		260	472		1			2		860
EIS/DEIS/FEIS			6	2							8
CAT. EXCL			3	5					123		131
OTHER (FONSI,Checklist,	38		1,195	176							1,409
TOTAL	1,175	3,114	5,141	3,400	1,581	38	23	175	771	3	15,421

SENATE NATURAL RESOURCES
EXHIBIT NO. 16
DATE 3-3-99
BILL NO. HB 142

Montana Audubon
P.O. Box 595 Helena, MT 59624 • 406-443-3949

Testimony on HB 142
Senate Natural Resources Committee
March 3, 1999

Mr. Chairman and Members of the Committee,

My name is Janet Ellis and I'm here today representing Montana Audubon. Montana Audubon is composed of nine Chapters of the National Audubon Society and has approximately 3,200 members.

The Audubon Fund opposes HB 142.

The Montana Environmental Policy Act (MEPA) is Montana's most important environmental law. It requires us to examine a "major action of state government: and its affect on our environment." A "major action of state government" is defined as an action "significantly affecting the quality of the human environment." Such actions require the preparation of an environmental review - a process that allows alternatives to be examined and the public to have a voice when something "significant" is about to happen to their environment.

This policy makes sense. It allows Montanans to stop and think and plan for the future. It is a good state policy to examine things closely when something "significant" is about to happen to our environment.

HB 142 proposes to exempt many activities of the land Board and on school trust land from MEPA. It is difficult to know what activities would and would not be exempt under this legislation - so it is difficult to determine if these activities would "significantly" affect our environment.

We do not feel that statutorily exempting anything from MEPA is a good policy - and that there are better ways to accomplish what we understand DNRC wants to do.

• **Statutory Exemptions**. Currently there are only 5 statutory exemptions from MEPA:

1. Actions of the Legislature
2. Public Service Commission regulatory activities;
3. In timber sale emergency situations or time dependent access situations involving timber, to the extent that the Department of Natural Resources and Conservation's compliance with MEPA is precluded by limited time;
4. Issuance of a historic right-of-way deed; and
5. Certain changes to hard rock mining operating permits.

The advantage of a statutory exemption is that the agency never has to use MEPA. The disadvantage of a statutory exemption is that if a situation arises that warrants MEPA review, the agency will not do it.

Generally, when an agency feels that an activity should not be subject to MEPA, it does not ask for a statutory exclusion. Instead, it does a programmatic review or asks for a categorical exclusion. Programmatic reviews and categorical exclusions are set up as flexible tools in MEPA

that allow agencies to develop a quick environmental check list for activities or exclude certain categories - or groups - of act ivies from extensive environmental reviews.

• **Programmatic Environmental Review.** DNRC can, under its adopted MEPA rules (Rule XVII(1)) conduct a programmatic EA or an EIS. "Whenever an agency is contemplating a series of agency-initiated actions, programs, or policies which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing he impacts of the series of actions."

• **Categorical Exclusions.** DNRC can categorically exclude activities from MEPA under its existing rules. (Rule III (5) of the model MEPA rules adopted by DNRC identifies six situations where there is no need for environmental review.) What this would involve is that DNRC go through rulemaking to categorically exclude certain activities from MEPA. They would be required to define the activities that should be exempt from MEPA in a proposed rule.

The advantage of doing MEPA compliance through a programmatic or categorical exclusion is that DNRC would have to outline the conditions under which activities would be excluded from MEPA. And if circumstances arise that warrant MEPA review, the agency would be able to do an environmental review.

So what about activities on state lands? Is it prudent to decide that these activities will never "significantly" affect our environment? We think not.

MEPA is Montana's environmental safety net. Planning is essential as Montana continues to grow. HB 142 predetermines the answer to the key questions MEPA asks. This is bad policy, for we cannot know the answer unless we ask the question. And there is no harm in asking the question unless we fear the answer.

Montana Audubon urges you to vote "Do Not Pass" on HB 142 and continue to protect Montana's environment. We feel that DNRC should go through the rulemaking process to categorically exclude gravel crushers from MEPA.

Thank you.

75-1-201. General directions -- environmental impact statements. (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) In any action challenging or seeking review of an agency's determination that a statement pursuant to subsection (1)(b)(iv) is not required, the burden of proof is on the person challenging the decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

History: En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch. 473, L. 1987; amd. Sec. 1, Ch. 566, L. 1989; amd. Sec. 1, Ch. 331, L. 1995; amd. Sec. 3, Ch. 352, L. 1995; amd. Sec. 177, Ch. 418, L. 1995; amd. Sec. 67, Ch. 545, L. 1995.

77-5-201. Sale of timber. (1) Under the direction of the board, the department may sell the timber crop and other crops of the forests after examination, estimate, appraisal, and report and under any rules established by the board.

(2) Timber proposed for sale in excess of 100,000 board feet must be advertised in a paper of the county in which the timber is situated for a period of at least 30 days, during which time the department must receive sealed bids up to the hour of the closing of the bids, as specified in the notice of sale.

(3) (a) In cases of emergency due to fire, insect, fungus, parasite, or blowdown or in cases when the department is required to act immediately to take advantage of access granted by permission of an adjoining landowner, timber proposed for sale not in excess of 1 million board feet may be advertised by invitation to bid for a period of not less than 10 days. The department may reject any or all bids, upon approval of the board, or it shall award the sale to the highest responsible bidder.

(b) (i) In cases when the department is required to act immediately to take advantage of access granted by permission of an adjoining landowner and there is only one potential buyer with legal access, the department may negotiate a sale of timber not in excess of 1 million board feet without offering the timber for bid if the sale is for fair market value.

(ii) The provisions of subsection (3)(b)(i) do not apply to situations when the only access is totally controlled by a potential purchaser of the timber, in which case the department shall seek to negotiate permanent, reciprocal access.

(c) In the situations described in subsections (3)(a) and (3)(b)(i), the department is not required to comply with the provisions of 75-1-201(1) to the extent that compliance is precluded by limited time available to take advantage of the sales opportunities described by this subsection (3).

History: En. Sec. 4, Ch. 179, L. 1925; re-en. Sec. 1830.4, R.C.M. 1935; amd. Sec. 98, Ch. 253, L. 1974; amd. Sec. 1, Ch. 301, L. 1977; R.C.M. 1947, 81-1404(part); amd. Sec. 1, Ch. 529, L. 1981; amd. Sec. 1, Ch. 139, L. 1983; amd. Sec. 1, Ch. 223, L. 1995.

77-1-130. ***(Temporary)*** **Recognition of historic right-of-way -- criteria for right-of-way deed -- conditions -- fees.** (1) A person or a county may apply to the department for a historic right-of-way deed to provide access to the applicant's private property or to provide continuation of a county road by filing an application with the department by October 1, 2001, on a form prescribed by the department. An application must be accompanied by:

(a) an application fee of $50;

(b) a notarized affidavit:

(i) demonstrating that the applicant or the applicant's predecessor in interest used the right-of-way applied for before 1973 and that the use has continued to the present;

(ii) describing the purpose for which the right-of-way was used before 1973; and

(iii) demonstrating that the historic right-of-way applied for is the right-of-way demonstrated in the evidence provided in subsection (1)(c); and

(c) (i) aerial photographs taken by an agency of the United States demonstrating use of the right-of-way applied for; or

(ii) other evidence of the use of the right-of-way applied for.

(2) The department shall review an application and other evidence submitted pursuant to subsection (1) and shall issue a historic right-of-way deed in the name of the applicant if:

(a) the applicant pays the application fee provided in subsection (1)(a) and the fair market value of the historic right-of-way as provided in subsection (4);

(b) the applicant has shown by substantial evidence the matters required in subsections (1)(b) and (1)(c)(i) or (1)(c)(ii);

(c) the department has, if necessary, made a field inspection of the right-of-way applied for; and

(d) the deed is approved by the board.

(3) A historic right-of-way deed issued in the name of the applicant must contain the description of the property of the applicant to which it is appurtenant as provided in the application, and the right-of-way must thereafter be considered appurtenant to that dominant estate. A deed may be assigned by the applicant to the applicant's successor in interest with the approval of the department. The department may not require a fee for the approval of an assignment and may not withhold approval for any reason other than that the use of the historic right-of-way is contrary to subsection (5).

(4) (a) At the time of issuing the historic right-of-way deed, the department shall collect from the applicant the full market value of the acreage of the historic right-of-way based on the following classifications of land:

(i) $37.50 per acre for state land classified as grazing land;

(ii) $275 per acre for state land classified as timber land;

(iii) $100 per acre for state land classified as crop land; and

(iv) $100 per acre for other land.

(b) Amounts collected pursuant to subsection (4)(a) must be deposited in the appropriate trust fund established for receipt of income from the land over which a historic right-of-way is granted.

(5) If application is made in accordance with this section, a historic right-of-way deed must be issued by the department, subject to the approval of the board, on the following terms:

(a) the right-of-way is only for the minimum width necessary, as negotiated by the department and the applicant; and

(b) the right-of-way is only for the physical condition of the road existing on the date the historic right-of-way deed is issued by the department.

(6) Issuance of a historic right-of-way deed pursuant to this section is exempt from the requirements of Title 75, chapter 1, parts 1 and 2, and Title 22, chapter 3, part 4.

(7) The survey requirements of 77-2-102 may be waived by the department for the issuance of a historic right-of-way deed if the department determines there is sufficient information available to define the boundaries of the right-of-way for the purposes of recording the easement.

(8) The department may attach conditions to a historic right-of-way deed necessary to ensure compliance with this chapter. However, the department may not require reversion of the right-of-way to the state.

(9) For the purposes of this section, "historic right-of-way deed" means a document issued by the department granting to the applicant a nonexclusive easement over state land. *(Terminates October 1, 2003--sec. 5, Ch. 461, L. 1997.)*

History: En. Sec. 1, Ch. 461, L. 1997.

82-4-342. Amendment to operating permits. (1) During the term of an operating permit issued under this part, an operator may apply for an amendment to the permit. The operator may not apply for an amendment to delete disturbed acreage except following reclamation, as required under 82-4-336, and bond release for the disturbance, as required under 82-4-338.

(2) The board may by rule establish criteria for the classification of amendments as major or minor. The board shall adopt rules establishing requirements for the content of applications for major and minor amendments and the procedures for processing minor amendments.

(3) Applications for major amendments must be processed pursuant to 82-4-337.

(4) The department shall review an application for a minor amendment and provide a notice of decision on the adequacy of the application within 30 days. If the department does not respond within 30 days, then the permit is revised in accordance with the application.

(5) The department is not required to prepare an environmental assessment or an environmental impact statement for the following categories of action:

(a) actions that qualify for a categorical exclusion as defined by rule or justified by a programmatic review pursuant to Title 75, chapter 1;

(b) administrative actions, such as routine, clerical, or similar functions of a department, including but not limited to administrative procurement, contracts for consulting services, and personnel actions;

(c) repair or maintenance of the permittee's equipment or facilities;

(d) investigation and enforcement actions, such as data collection, inspection of facilities, or enforcement of environmental standards;

(e) ministerial actions, such as actions in which the agency does not exercise discretion, but acts upon a given state of facts in a prescribed manner;

(f) approval of actions that are primarily social or economic in nature and that do not otherwise affect the human environment;

(g) changes in a permit boundary that increase disturbed acres that are insignificant in impact relative to the entire operation, provided that the increase is less than 10 acres or 5% of the permitted area, whichever is less; and

(h) changes in an approved operating plan or reclamation plan for an activity that was previously permitted, provided that the impacts of the change will be insignificant relative to the impacts of the entire operation and there is less than 10 acres of additional disturbance.

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE

ROLL CALL DATE March 3, 1999

NAME	PRESENT	ABSENT	EXCUSED
SEN. BILL CRISMORE, CHAIRMAN	X		
SEN. DALE MAHLUM, VICE CHAIRMAN	X		
SEN. VICKI COCCHIARELLA	X		
SEN. MACK COLE	X		
SEN. LORENTS GROSFIELD	X		
SEN. TOM KEATING	X		
SEN. BEA MC CARTHY	X		
SEN. KEN MILLER	X		
SEN. GLENN ROUSH	X		
SEN. MIKE TAYLOR	X		
SEN. BILL WILSON	X		

DATE 3-3-99

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: HB 120, HB 95, HB 142

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Anne Hedges	443-2520	MEIC	142		X
Larry Mitchell	676-5164	FDWS	142		X
Tommy Butler	444-3776	DNRC	HB 142	✓	
John Bloomquist	4-2211	MT. Stockgrowers	HB142	✓	
Lorna Karn	442-9476	MT. FARM BUREAU	HB95 HB142	✓	
Richard Parker	848-7314	Beav Co. Council	HB 142		✓
Beth Kaeding	565-5644	Self	HB142		X
Julie Page	848-7571	NPRC	142		X
Jim Sweaney	848-7602	Self	142		X
Bill HOLDORF	490-6073	SKYLINE SPORTSMEN	142		X
Tony Schoonen	782-1566	Skyline Sportsmen	142		X
Charles Brooks	442-2405	Billings Chamber	95	✓	
Betty Ralph Amated	626-5693	self	142		X

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 3-3-99

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY:

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Betty Wadder	442-3525	MT Assoc. of Churches	HB 142		X
Janet Ellis	443-3949	MT Audubon	HB142		✓
Tom Richmond	656-0040	MT Board of Oil & Gas	HB120	✓	
Gail Abercrombie	442-7582	MT Petroleum Assn	HB 142 ✓ HB120 ✓		
Cary Hegreberg		Wood Products Assoc.	HB142	✓	
Joe Lamson	4-7094	OPI	AB 142		X
Joe Kervin	4-5376	Sec. of State	HB142		X
Lea Holt	961 3302	RAVALLI COUNTY FISH & WILDLIFE ASSOC	HB142		X
Ellen Jamison	443-0815	Montana Wildlife Federation	HB142		X
Rusty Harper	4-2725	St. Auditor's Office	HB142		X
George Darrow	406-587-4400	Self	HB142		X
Denise Ruth Bader	—	MT Sierra Club	HB142		X
Holly Franz	442-8560	MT Power Co.	HB 95	✓ w/amend	
Don Allen	443-5541	WETA	HB142	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

(3)

DATE 3-3-99

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY:

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Lee Archuleta	442-4442	Mt. League of Women Voters	142		
PATRICK HOFFORNAN	752-3168	MLA	142	X	
AL KINGTON	458-5286	IFPA	142	X	
BUD CLINCH	444-2074	DNRC	142 95	X	

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VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

LEGISLATIVE TAPE LOG

COMMITTEE: Natural Resources

DATE: March 3, 1999

	MINUTES	CONTENT NOTES
	0-10.1	Sponsor Opening - HB 120 Proponent Testimony Committee Questions and Sponsor Closing
	____	Executive Action - HB 120
	10.1-20.3	Sponsor Opening - HB 95 Proponent Testimony Committee Questions
	____	Sponsor Closing Executive Action - HB 95
	20.3-40	Sponsor Opening - HB 142 Proponent Testimony
SIDE B	0-34	Proponent Testimony Opponent Testimony
Tape 2	0-42	Opponent Testimony Committee Questions
SIDE B	0-19	Committee Questions Sponsor Closing - HB 142
	____	
	____	

MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN WILLIAM CRISMORE**, on March 10, 1999 at 3:20 P.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. William Crismore, Chairman (R)
Sen. Dale Mahlum, Vice Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Mack Cole (R)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Glenn Roush (D)
Sen. Mike Taylor (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Larry Mitchell, Legislative Branch
Jyl Scheel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 96, 3/10/1999; HB 74, 3/10/1999; HJ 8, 3/10/1999; HJ 11, 3/10/1999; HJ 17, 3/10/1999
Executive Action: HB 331; HB 58; HB 142

HEARING ON HB 96

Sponsor: **REPRESENTATIVE LARRY GRINDE, HD 94, LEWISTOWN**

Motion/Vote: **SEN. COLE** moved that **HB 58 BE CONCURRED IN AS AMENDED. Motion carried 10-1 with Mahlum voting no. SENATOR COLE** will carry bill to Senate floor.

EXECUTIVE ACTION ON HB 142

Motion: **SEN. KEATING** moved that **HB 142 BE CONCURRED IN.**

Motion: **SEN. WILSON** moved that **HB 142 AMENDMENTS HB014201.ALM BE ADOPTED. EXHIBIT(10).**

Discussion:

SENATOR WILSON discussed the proposed amendment as per **(EXHIBIT 10)**. His reasoning for proposing the amendment is he feels the rules are being changed in mid-stream. There are several people that participated in Environmental Assessments and Environmental Impact Statements and testified in good faith. He feels it is unfair they be cut out with this bill at this time. The amendment would eliminate the retroactive applicability provision of the bill.

SENATOR KEATING questioned the effects of the amendment. **Tom Butler, Legal Counsel, Department of Environmental Quality,** stated he felt the amendment was accurately described in that it would remove the retroactive applicability portion of the bill. The issue preclusion and evidentiary preclusion portions of the bill would not kick in until after passage and approval of **HB 142. SENATOR KEATING** questioned why was the retroactive applicability put into the bill in the first place? **Mr. Butler** stated it was added for various **MEPA** review documents being prepared under this interpretation of the bill and if there is no retroactivity clause, they have to go back and supplement some of the environmental reviews.

SENATOR COLE questioned if he had reviewed this amendment? **Mr. Simonich** stated he saw the amendment about 30 minutes ago. He believed **SEN. WILSON** explained the scope of the amendments. He clarified that any individual involved in the **MEPA** process so far with good intent would not be precluded from being involved. The intent of the issues involved is for new evidence and new issues. If they have already been involved, they are in. **SEN. COLE** stated if they are already included he is wondering if the amendments are needed and if they would be beneficial.

SENATOR GROSFIELD questioned if there was anything in particular he had in mind with the amendment? **SEN. WILSON** stated not

necessarily but the way he understands the bill is there are several things being overhauled in **MEPA**. The people came in under a certain set of rules and started the process, now we are changing it. The amendment is just a blanket approach in that regard.

Vote: Motion that **AMENDMENTS HB014201.ALM BE ADOPTED failed 4-7** with **Crismore, Mahlum, Cole, Grosfield, Keating, Miller and Taylor voting no.**

Motion: **SEN. COCCHIARELLA** moved that **AMENDMENTS HB014202.ALM BE ADOPTED. EXHIBIT(11)**

SENATOR COCCHIARELLA stated these amendments were to be carried by someone else on the committee who changed their mind She stated she had served on the **Environmental Quality Council** for six years. To serve in that process, education moderates. If you come in as an extreme environmentalist you do not leave the same way. There are extremes from both sides who serve on **EQC.** If you leave there without a sense of what is right about all sides and perspectives then you have not listened and paid attention. She does not like **MEPA** bills because she believes in the **EQC** process. She believes this is the wrong approach and she feels people involved in the **EQC** process know in their hearts that if **EQC** had taken on the project of reviewing **MEPA**, there would be a bigger, better and broader package of legislation than this piece meal attack on certain elements of the **MEPA** process.

She believes, after serving on **EQC**, the permitting does not work. The rules by the Departments and agencies have caused them to virtually stop anything from happening in Montana when it is legitimate and right and it can benefit all citizens and be Constitutional. **MEPA** is a tool and the right tool to use. The process has been eroded and needs thorough review by **EQC.** The whole process needs review not just a bandaid approach. She is in favor of adopting the Attorney General's amendments to help slow down the destruction of **MEPA** which has been a good tool that used to be able to be used to make good decisions. This is a wrong thing to do to this whole process for both sides of this issue.

SENATOR KEATING stated he appreciated **SEN. COCCHIARELLA'S** feelings and all the good work she had done on **EQC.** He has also been around the **MEPA** process for a long time. Many times the usual process of beneficial development was hindered by the use of **MEPA** as a tool to obstruct development and the economic growth in Montana. He has worked without attacking **MEPA** in total at anytime. He has worked to refine **MEPA** in various areas where

certain groups wanted to stop industry and growth and wanted to stop livelihoods for people by using this as a tool of obstruction. They do it in the courts, by complaints and there are delays that make projects that are perfectly safe to the environment uneconomical and we lose the activity with the discouragement. Now these groups, even with the changes in **MEPA** over the years, use the procedure to inhibit perfectly good projects. Now they have come down to stopping the Department of State Lands from properly harvesting forests. They use the procedure to harass and undermine the permitting process of the Department, which is working for the benefit of all Montanans. The money derived from those projects and the harvest of the forest is for the benefit of education and the benefit of the people of Montana as required under the Constitution. Yet there are certain groups that will use this procedure to inhibit unnecessarily. If they had good reason to stop the project that is one matter, but when they do not have good reason to stop the project that is quite another. These amendments by the Attorney General are only to replace those obstructions that we are trying to remedy in this so the Department of State Lands can do what they are required to do under the Constitution and what others want to do for the benefit of the state as a whole. He urges the committee to reject the amendments to pass this bill as is and let everyone get back to work.

SENATOR TAYLOR stated since he was to carry the amendments originally, he wanted to explain what he was trying to do. He does not want to see a legal relief act. When you try to start balancing the right and left it becomes difficult. That is the purpose of trying to find common ground. When he reviewed the amendments he felt they took more out of the bill to tilt it more to one side than the other. It is important that all sides of every issue come to middle ground without involving the legal profession to the point that everyone loses.

SENATOR COLE agreed the amendments do not help the bill. The bill is the center and will be beneficial to the State of Montana and he hopes the committee does not pass the amendments.

SENATOR GROSFIELD feels several of the amendments are problematic and referred especially to amendment #4 where he felt a separation of powers issue was being set up. He felt the court would be getting in the middle of the administrative duties of the agency. He does not feel we want to do that. Amendments 8 and 9 talk about a similar situation where the Court will run the Department. He feels the bill is better off without the amendments.

Vote: Motion that **AMENDMENTS HB014202.ALM BE ADOPTED failed 4-7** with **Senators Crismore, Mahlum, Cole, Grosfield, Keating, Miller and Taylor voting no.**

Motion/Vote: **SEN. KEATING** moved that **HB 142 BE CONCURRED IN. Motion carried 6-5** by Roll Call Vote with **Senators Mahlum, Cocchiarella, McCarthy, Roush and Wilson voting no. Senator Keating** will carry bill to Senate Floor.

{Tape : 2; Side : A; Approx. Time Counter : 0 - 22; Comments : None.}

ADJOURNMENT

Adjournment: 5:20 P.M.

SEN. WILLIAM CRISMORE, Chairman

JYL SCHEEL, Secretary

WC/JS

SENATE NATURAL RESOURCES
EXHIBIT NO. 10
DATE 3-10-99
BILL NO. HB142

Amendments to House Bill No. 142
3rd Reading Copy

Requested by Senator Bill Wilson

For the Senate Natural Resources Committee

Prepared by Larry Mitchell
March 9, 1999 (4:03PM)

1. Title, line 11.
Strike: "AND A RETROACTIVE APPLICABILITY DATE"

2. Page 4.
Following: line 9
Insert:
"NEW SECTION. **Section 4. {standard} Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act]."
Renumber: subsequent sections

3. Page 4, line 13 through line 14.
Strike: section 5 in its entirety

- END -

SENATE NATURAL RESOURCES
EXHIBIT NO. 11
DATE 3-10-99
BILL NO. HB142

Amendments to House Bill No. 142
3rd Reading Copy

Requested by Senator Mike Taylor
For the Senate Natural Resources Committee

Prepared by Larry Mitchell
March 10, 1999 (1:59PM)

1. Page 3, line 10.
Strike: "(A)"

2. Page 3, line 12.
Strike: "EXCEPT AS PROVIDED IN SUBSECTION (3)(b), IN"
Insert: "In"

3. Page 3, line 13.
Following: "issue"
Strike: "or evidence"

4. Page 3, line 14.
Strike: "for the agency's consideration prior to the agency's decision"
Following: "decision."
Insert: "If application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and any modification, new findings, or decision with the court."

5. Page 3, line 17 through line 23.
Strike: subsection (B) in its entirety

6. Page 3, line 25.
Following: "(1)"
Strike: "The"

Insert: "Except as provided in subsection (2), the"

7. Page 3, line 27.
Following: "is"
Insert: "engaged in rulemaking or is"

8. Page 3, line 30 through page 4, line 2.
Strike: "Except" on page 3, line 30 through "The" on page 4, line 2
Insert: "Except when the department and board have a specific statutory duty to avoid environmental harm and specific knowledge that environmental harm may arise when the department or board do not act, the"

9. Page 4, line 5.
Following: "action."
Insert: "As a prerequisite to filing a judicial action seeking to challenge a failure by the department or board to take a required action, the department or board shall first be given written notice of the inaction complained of, the statute upon which the request to act is based, and the factual circumstances giving rise to the alleged duty to act. The department or board must have 30 days to respond to the notice. If the department or board do not take the requested action, a judicial proceeding seeking to challenge the decision not to act must be brought within 90 days of the alleged inaction or failure to act by the department or board."

- END -

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE

ROLL CALL DATE March 10, 1999

NAME	PRESENT	ABSENT	EXCUSED
SEN. BILL CRISMORE, CHAIRMAN	X		
SEN. DALE MAHLUM, VICE CHAIRMAN	X		
SEN. VICKI COCCHIARELLA	X		
SEN. MACK COLE	X		
SEN. LORENTS GROSFIELD	X		
SEN. TOM KEATING	X		
SEN. BEA MC CARTHY	X		
SEN. KEN MILLER	X		
SEN. GLENN ROUSH	X		
SEN. MIKE TAYLOR	X		
SEN. BILL WILSON	X		

SENATE STANDING COMMITTEE REPORT

Mr. President:

We, your committee on **Natural Resources** report that **House Bill 58** (third reading copy -- blue) **be concurred in as amended.**

Signed: Wm S Crismore
Senator William Crismore, Chair

To be carried by Representative Mack Cole

And, that such amendments read:

1. Page 5, line 2.
Following: "undertaken"
Strike: "continuously"
Insert: ", in accordance with a corrective action plan approved by the department,"

2. Page 5, line 7.
Following: "railroad"
Insert: ", except for a tank that was operated by a lessee of a railroad in the course of nonrailroad operations"

- END -

Committee Vote:
Yes 10, No 1.

551207SC.sjo

SENATE STANDING COMMITTEE REPORT

March 11, 1999

Mr. President:

We, your committee on **Natural Resources** report that **House Bill 142** (third reading copy -- blue) **be concurred in.**

Signed: _____
Senator William Crismore, Chair

To be carried by Senator Tom Keating

- END -

Committee Vote:
Yes 6, No 5.

550921SC.sjo

SENATE STANDING COMMITTEE REPORT

Mr. President:

We, your committee on **Natural Resources** report that **House Bill 331** (third reading copy -- blue) **be concurred in.**

Signed: _____
Senator William Crismore, Chair

To be carried by Senator Glenn Roush

- END -

Committee Vote:
Yes 8, No 1.

550920SC.sjo

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3-10-99 BILL NO. HB 142 NUMBER 1

MOTION: HB 1420 alm amendments be adopted

NAME	AYE	NO
SEN. BILL CRISMORE, CHAIRMAN		X
SEN. DALE MAHLUM, VICE CHAIRMAN		X
SEN. VICKI COCCIARELLA	X	
SEN. MACK COLE		X
SEN. LORENTS GROSFIELD		X
SEN. TOM KEATING		X
SEN. BEA MC CARTHY	X	
SEN. KEN MILLER		X
SEN. GLENN ROUSH	X	
SEN. MIKE TAYLOR		X
SEN. BILL WILSON	X	

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3-10-99 BILL NO. HB 142 NUMBER 2

MOTION: HB 142 2nd amendments be adopted

NAME	AYE	NO
SEN. BILL CRISMORE, CHAIRMAN		X
SEN. DALE MAHLUM, VICE CHAIRMAN		X
SEN. VICKI COCCIARELLA	X	
SEN. MACK COLE		X
SEN. LORENTS GROSFIELD		X
SEN. TOM KEATING		X
SEN. BEA MC CARTHY	X	
SEN. KEN MILLER		X
SEN. GLENN ROUSH	X	
SEN. MIKE TAYLOR		X
SEN. BILL WILSON	X	

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 2-10-99 BILL NO. HB 142 NUMBER 3

MOTION: HB 142 Be Concurred In

NAME	AYE	NO
SEN. BILL CRISMORE, CHAIRMAN	X	
SEN. DALE MAHLUM, VICE CHAIRMAN		X
SEN. VICKI COCCIARELLA		X
SEN. MACK COLE	X	
SEN. LORENTS GROSFIELD	X	
SEN. TOM KEATING	X	
SEN. BEA MC CARTHY		X
SEN. KEN MILLER	X	
SEN. GLENN ROUSH		X
SEN. MIKE TAYLOR	X	
SEN. BILL WILSON		X

DATE 3-10-99

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: HB96, HB74, HJ8, HJ11, HJ17

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
John Hossack	406 296-2374	O & H Lumber Eureka MT	HJ 17	↘	
Mike Foster	442-4162	MT Contractors' Assoc.	HB 74	✓	
Tom Livers	444-6776	DEQ	74	✓	
Lucy Hansen-Gallen	443-8084	Montana Rural Water	HB 74	X	
Katrina Scheuerman	443-3949	MT Audubon	HJ 8		X
Clive Rooney	444-3844	DNRC	HB96	X	
Bud Clinch	444-2074	DNRC	HB-96	X	
Lorna Karn	442-9476	MT. Farm Bureau	HJ-17 HJ8		
Dan McGee	444-6713	DNRC	HJ 11	✓	
Jill Andrews	443-7297	MT Mining Assoc	HJ 8	✓	
John Mundinger	442-3420	MSGA	HJ8	✓	
John Mundinger	442-3420	MSGA	HJ11	✓	
Don Allen	443-5184	WETA	HB96 HJ 08 HJ 17	✓ ✓ ✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

(2)

DATE 3-10-99

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: HB 96, HB 74, HJ 8, HJ 11, HJ 17

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Alec Hansen	442 8768	Cities	HB 74	✓	
Mike Murphy	458-6487	MT. WATER RES. ASSN	HJR 8 HJR 11	X	
Jon Metropoulos	442-8560	Flathead Joint Board of Control, Lower Yellowstone Irrig. District	HJR 8 HJR 11	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

LEGISLATIVE TAPE LOG

COMMITTEE: Natural Resources

DATE: March 10, 1999

MINUTES	CONTENT NOTES
0-4.4	Sponsor Opening - HB 96 Proponent Testimony Questions from Committee
____	Sponsor Closing - HB 96
4.4-30	Sponsor Opening - HB 74 Proponent Testimony Questions from Committee
____	Sponsor Closing - HB 74 Sponsor Opening - HJ 8 Proponent Testimony
____	Opponent Testimony Questions from Committee Sponsor Closing - HJ 8
____	Sponsor Opening - HJ 11 Proponent Testimony Questions from Committee
____	Sponsor Closing - HJ 11
SIDE B 0-21.9	Sponsor Opening - HJ 17 Proponent Testimony
____	Questions from Committee Sponsor Closing - HJ 17
21.9-28.7	Executive Action - HB 331 & HB 346
28.7-40	Executive Action - HB 58
Tape 2 0-22	Executive Action - HB 58 continued " " - HB 142

AN ACT CLARIFYING THE TREATMENT OF A TRANSFER OF OWNERSHIP PURSUANT TO THE MONTANA ENVIRONMENTAL POLICY ACT; LIMITING A COURT'S SCOPE OF REVIEW FOR AN ACTION OR CHALLENGE THAT AN ENVIRONMENTAL STATEMENT OR REVIEW IS NOT REQUIRED OR THAT THE STATEMENT OR REVIEW IS INADEQUATE; CREATING EXEMPTIONS FROM THE PROVISIONS OF THE MONTANA ENVIRONMENTAL POLICY ACT FOR ACTION TAKEN UNDER TITLE 77, MCA; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-1-201, MCA, is amended to read:

"**75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major

actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; ~~and~~

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal,

and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) (a) In any action challenging or seeking review of an agency's ~~determination~~ decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence is presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review."

Section 2. Environmental review -- exemption. (1) The department and board are required to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 only if the department is actively proposing to issue a sale, exchange, right-of-way, easement, placement of improvement, lease, license, permit, or other authorization for use of state lands or is acting

in response to an application for an authorization.

(2) Except for rulemaking and as provided in subsection (1), the department and board are otherwise exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77, including but not limited to the issuance of lease renewals. The department and board do not have an obligation to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 if the department or board choose not to take any action, even though either may have the authority to take an action.

Section 3. Codification instruction. [Section 2] is intended to be codified as an integral part of Title 77, chapter 1, part 1, and the provisions of Title 77, chapter 1, part 1, apply to [section 2].

Section 4. Effective date. [This act] is effective on passage and approval.

Section 5. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before an agency on [the effective date of this act].

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